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In The

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 182

L. L. McGUIRE,

Petitioner,

v.

JOHN F. BAKER, ET AL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

L. L. McGUIRE,
Rt. 2, Midlothian, Texas
76065

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The petitioner L. L. McGuire respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 26, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto, page A-10. The un-

reported memorandum opinion of the District Court for the Northern District of Texas, Fort Worth Division, appears in the Appendix hereto, page A-1.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 26, 1970. A timely petition for rehearing was denied on April 20, 1970, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether McGuire's right to recover compensation from defendants, for the 4 year taking and sale of his lands to defendants by the State of Texas, is a right created only by the Civil Rights Statutes, or whether this right was created and exist by virtue of patents or deeds from the State to McGuire's predecessors in title to the lands.

2. Whether McGuire has a direct remedy under the Constitution and outside Civil Rights Acts, for compensation for the 4 year taking of his lands, against defendants, grantees of the State which did the taking.

3. Is the Texas 2 year statute of limitations, Article 5526, applicable to a suit against defendants for compensation for the 4 year taking, where defendants were grantees of the State which did the taking;

4. Whether McGuire, irrespective of any limitation statutes, could wait until he terminated the taking in another suit, and until he knew the length of the taking, amount of land taken, and his loss thereby, to bring

suit for compensation for the taking, under the rule of *United States v. Dickinson*, 331 U.S. 745, 67 S.Ct. 1382, 91 L. Ed. 1789, where the taking was caused by wrongful acts of defendants.

5. Whether in Texas the statute of limitations to be applied to a civil rights suit is the one applicable to an analogous wrong not done under color of law, or whether it is the 2 year statute, applicable to all civil rights suits because they are liabilities created by statute.

6. Is the Texas 2 year statute, article 5526 or the 4 year statute, article 5529, applicable to this equity suit, a suit for recovery of lease money paid Bryant under a constructive trust theory.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution Article 1, Section 10:

"No State shall * * * pass any * * * Law impairing the Obligations of Contract * * * "

Fourteenth Amendment, Section 1:

" * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Vernon's Annotated Civil Statutes of Texas:

Volume 16, page, 407,

Article 5510. Ten years possession

Any person who has the right of action for the recovery of lands, tenements or hereditaments against

another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward. The peaceable and adverse possession contemplated in this article, as against the person having right of action, shall be construed to embrace not more than one hundred and sixty acres, including the improvements or the number of acres actually enclosed, should the same exceed one hundred and sixty acres; but when such possession is taken and held under some written memorandum of title, other than a deed, which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be co-extensive with the boundaries specified in such instrument. Id.; P.D. 4621-24.

Volume 16-A, page 11, 94, 144

Art. 5526. Actions to be commenced in two years

There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions of trespass for injury done to the estate or the property of another.

4. Actions for debt where the indebtedness is not evidenced by a contract in writing.

Art. 5527. What actions barred in four years

There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing.

Art. 5529. All other actions barred, when

Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued and not afterward.

Volume 15 Vernon's Civil Statutes of Texas, pages 596-604 Article 5421c Regulating sale and lease of school lands, public lands and river bed;

> Sec. 6a. "Vacancy" when used in this Act, means an area of unsurveyed school land not in conflict on the ground with lands previously titled, awarded, or sold, which has not been listed on the records of the Land Office as school lands and which on the date of the filing was neither subject to an earlier subsisting application to purchase or lease by a discoverer or claimant nor involved in pending litigation brought by the State to recover the same.

Article 5421c is many pages long but nothing in it has any bearing on whether this suit is barred by limitations. It provides that one who desires to purchase what he believes is vacant land shall file an application with the Land Commissioner. The Commissioner appoints a surveyor who surveys the area to determine if the land claimed to be vacant is really vacant and does not belong to another owner. The applicant pays for the survey. The Commissioner holds a hearing to determine if the vacancy exists. If he decides there is a vacancy the applicant may purchase it.

42 U.S.C.A. Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution

and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This is the second of two suits brought by petitioner, L. L. McGuire, to redress the taking and sale of his lands by the Texas Land Commissioner, Jerry Sadler, by the misuse of Article 5421c Revised Statutes of Texas. The first suit, McGuire v. Sadler et al, against Commissioner Sadler, purchaser M. D. Bryant, and surveyor Perry Thompson, filed October 1, 1962, was an injunction-cancellation suit to prevent and later to cancel the sale, after Sadler had determined parts of McGuire's lands and other lands, were vacant unsurveyed unsold lands as a result of a plat made by surveyor Thompson, and were subject to sale by Bryant. Thompson's plat appears at the end of the appendix. The injunction suit was dismissed June 19, 1963, and McGuire's lands were sold to Bryant June 24, 1963. Appealed, the suit was reversed and remanded on October 19, 1964, 337 F. 2d 902. The district court after referral to Special Master over McGuire's objection and with defendants' approval, rendered judgment June 13, 1967 cancelling the sale and patents to Bryant of McGuire's lands, and this cause ended without further appeal. Appendix pp. A-18—A-28.

However on April 24, 1967 McGuire brought the present suit, McGuire v. Baker, et al, for compensation for the four year taking, from June 24, 1963 when his

lands were sold to Bryant, to June 13, 1967 when the sale was cancelled, for a recovery of moneys Bryant had received for a sale of an oil and gas lease on McGuire's lands, for damages for destruction of the speculative value of his lands while in the title and possession of Bryant and Gulf, and payment for surveying and legal work McGuire was forced to do for recovery of his lands. Made defendants were the defendants in the original suit, Bryant's heirs and estate in place of Bryant deceased, Gulf 0il and two of its employees, John F. Baker who made the survey upon which the Perry Thompson plat was prepared, and the Chief Clerk of the Texas Land Office, Jack Giberson. (Transcrip Vol. 1, page 3)

This suit was brought: (1) for direct relief against defendants under Article 1, Section 10 and the Fourteenth Amendment to the Constitution; (2) for relief under 42 U.S.C., Sections 1983, 1985 (2) and (3). Jurisdiction is conferred by 28 U.S.C., Sections 1331, 1343. The matter in controversy was in excess of $10,000 exclusive of interest and costs as to each defendant. (Transcript Vol. 1, pages 2, 3)

The complaint further alleged in substance as follows. McGuire was the owner of large parts of sections 7, 51, 95 and all the surface of 72, Texas Mexican Block 2, Presidio County, Texas, holding under patents to former owners. The minerals of section 72 belonged to the Texas School Fund but under Article 5368 R.S. of

Texas and Empire Gas & Fuel Co. v. State, 47 S.W. 2d 265, McGuire as surface owner had a right to receive one half of lease and oil and gas income for acting as agent of the State in leasing same.

It was alleged that M. D. Bryant, the Gulf Oil Corp., officials of the Texas Land Office and others, conspired to and did cause a dishonest survey to be made whereby the section lines of the area involved were moved so as to cut off 5,042 acres of land belonging to sections owned by the State, McGuire and others, designating it as vacant unsurveyed lands subject to sale to Bryant, under the provisions of Article 5421c Revised Statutes of Texas, whereas in truth there was no such vacant land in the area. Further the section lines were moved so as to take areas favorable for the accumulation of oil and gas, as previously determined by Gulf, out of sections owned by the State, McGuire and others, so as to place them in sections previously leased by Gulf or in the 5042 acres made available for purchase by Bryant. As part of the conspiracy the said 5042 acres was sold to M. D. Bryant on June 24, 1963 for $18,243, the State retaining a small mineral interest. On July 15, 1963 Bryant while keeping the land sold the Gulf a lease on the land for $50,423, a one year renewal rental of $5,042 and an oil payment above royalty of $504,231 out of production if any. There was no production.

It was further alleged the Gulf drilled a dry hole on the north end of McGuire's section 72, destroying its

speculative value, and that the Gulf concealed the fact from him that the well was on his section. McGuire first learned the well was on his land in 1967. 1946 acres of McGuire's land was taken; a fair share of the lease money received by Bryant apportioned to lands taken from McGuire was $25,806; the time and money expended by McGuire in recovering his lands was $20,000. (Entire complaint in Vol. 1 of Transcript pp. 2-17)

Both lower courts held in effect that McGuire has no direct remedy under the Constitution, that this is only a civil rights suit, and all civil rights suits in Texas are barred by Article 5526 Revised Statutes of Texas, the 2 year Statute of Limitation.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with decisions of the Supreme Court, other courts of appeals and a different panel of the Fifth Circuit Court, in holding McGuire did not have a direct remedy under the contract clause and the Fourteenth Amendment to the Constitution, for compensation for taking of his lands, and in holding that defendants' liability for the taking was created by the Civil Rights Act.

McGuire's underlying right to recover and defendants' liability was created by the patents from the State of Texas to McGuire's predecessors in title. These patents were deeds or contracts in writing. When Bryant sold Gulf a two year lease with right to drill, and the Gulf did drill, Bryant sold off an estate in the lands that was a major part of their value, and McGuire in

recovering the lands, recovered only a small part of what was taken from him. The speculative value of the lands was gone and partly in its place was the lease money to Bryant. McGuire has a right to this lease money and an additional amount to equal the decline in value of the lands while they were in title and possession of defendants.

In 1819, long before any Civil Rights Acts, John Marshall's Court gave damages for conversion in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518; 4 L. Ed. 629, against Woodward, who was not the state, but who held under authority of state legislation which impaired the charter or contract under which Dartmouth was founded.

In *Fletcher v. Peck*, (1810) 6 Cranch 87, 3 L. Ed. 162, the Supreme Court held that the State of Georgia could not reclaim land previously granted and grant it to another because the original grant was a contract which could not be impaired by a second grant. This was a suit between individuals, the state was not a party.

In *Wood v. Lovett*, (1941) 313 U.S. 362, 61 S.Ct. 983, 85 L. Ed. 1404, a suit between two individuals, the Court held the State of Arkansas could not weaken a tax title to land by legislation after it had sold land at tax sale.

In *Anderson-Tully Co. v. Murphree*, 153 F. (2) 874, the Eighth Circuit Court in a suit by Murphree to cancel a State Land Commissioner's deed of lands within

the boundaries of an older patent, held that the second deed impaired the contract of the older patent.

A different panel of the Fifth Circuit Court in reversing and remanding in *McGuire v. Sadler* (1964) 337 F. 2d 902, held that McGuire had a cause under both the Contract Clause and the Fourteenth Amendment and the court had jurisdiction under 28 U.S.C.A. Section 1331 in a suit to recover his land.

McGuire's right to recover for that part of the value of his lands not restored by the cancellation of the patents to Bryant is not a right created by the Civil Rights Act but by the original patents to McGuire's predecessors. The Ninth Circuit Court in *Smith v. Cremins*, (1962) 308 F. 2d 187, 189, a Civil Rights Case, said, "an action is not based 'upon a liability created by statute' if the right is one which would exist at common law in the absence of statute". Obviously defendants' liability herein was not created by the Civil Rights Statutes.

2. The decision below conflicts with *United States v. Dickinson*, (1947) 331 U.S. 745, 67 S. Ct. 1382, 91 L. Ed. 1789, and *Terteling v. United States*, (Ct. Cl. 1964) 334 F. 2d 250, in that it failed to hold McGuire could wait until the end of the four year taking, irrespective of limitation laws, before filing suit for compensation and damages.

The purpose of the two suits, to restore McGuire to his position as of before his lands were taken, could only be achieved, (1) by cancellation of the sale of the lands, (2) a money judgment equal to decline in value

of the lands while in title and possession of defendants, (3) compensation for surveying and legal work done by McGuire caused by defendants' fraudulent conduct. How could McGuire know the decline in value of the lands until the end of the taking period? The Gulf or some other lessee of Bryant might have found oil and there would have been no decline. How could McGuire know his legal and surveying expenses until they were performed, mostly in late 1965 and 1966? Defendants might have given him back his land before those expenses were necessary. How could McGuire know how much of his land was taken and for how long, until the district court had given him permission to make a survey on April 23, 1965, and he made his survey in 1965 and 1966, and the district court ruled on the correctness of surveyor Thompson's plat in June 1967? The district court might have said the Thompson plat was correct and none of McGuire's land was taken, or a small amount.

Sueing these defendants of great power and influence is an expensive and discouraging business. Why should McGuire be required to bring this suit against additional defendants and burden the courts until he knew he had a cause of action? McGuire did all a fair application of the limitation statutes requires, by filing the injunction-cancellation suit in October 1962 before the sale, in an effort to block and terminate the taking, and waiting until the end of the taking period in 1967, before sueing for compensation and damages.

In the Dickenson case, where the government had the right to take land by condemnation proceeding, but chose instead to let water rising behind a dam flood a citizens land and thus take it, the court held the citizen could wait until the flooding was complete and the amount of land taken thus determined, before filing suit despite any limitation laws.

In case at bar, where the State had no power to take land from McGuire in order to sell it to Bryant, but did take it by a dishonest survey, McGuire should be allowed to wait until he can determine what was taken before filing suit.

In the Terteling case where the government was liable for legal expenses, the Court of Claims held he could wait until the end of the litigation before sueing, regardless of limitation laws.

3. The decision below decides important state questions in conflict with applicable state law as to which statute of limitation applies.

The opinion below states: " * * * the wrong occurred where McGuire lost possession through the sale of the supposed vacancies to Bryant and the leasing of the property to Gulf." (Appendix p. A-15); "But, he chose only to get his land back". (Appendix p. A-16) A different panel of the Fifth Circuit on the same allegations said in *McGuire v. Sadler*, 337 F. 2d 902, 905, 906: "The plaintiff, however, presents a claim of impairment of contract under Article 1, Section 10 of the United States

Constitution." (Appendix p. A-20); "And there is deprivation of property — if we accept plaintiff's allegations." (Appendix p. A-22)

In Texas a "taking" is different from "damage" and different limitation laws apply. In *Brazos River Authority v. City of Graham*, (1961) 163 Tex. 167, 354 S.W. 2d 99, 109, the Texas Supreme Court held that in a suit for compensation for a taking, the 10 year statute, Art. 5510, applied. Herein it was the taking that caused McGuire's loss; if the Gulf had merely moved on his land and started drilling McGuire could have protected himself by selling leases. As it was he could not because defendants had a patent from the state and were in possession.

When the state sold and patented McGuire's land it impaired or breached its own contract in writing, the patent to McGuire's predecessors. At date of suit, April 24, 1967, four years had not yet elapsed. Art. 5527 R.S. of Texas, the 4 year statute, applies to: "Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing."

The court below erroneously applied Article 5526 R.S. of Texas:

> (1) Actions of trespass for injury done to the estate or the property of another.
>
> (4) Actions for debt where the indebtedness is not evidenced by a contract in writing.

The state patents to McGuire's predecessors certainly was a writing, McGuire's claim to the lease money received by Bryant was for sale of an interest in the land, not for an injury, and McGuire's loss was because his land was taken and its title impaired, not because the well was drilled. Drilling alone increases land value, from which a land owner can profit if his land is not taken or its title impaired. McGuire would be happy to have all his land drilled, even with dry holes, if the driller won't take the land or impair his title, because he could sell leases at high prices. When it is known a well is to be drilled the speculative value of surrounding lands greatly increases. Obviously no oil company is going to drill a well without first securing a lease or other interest in the land, or as herein, taking the land by getting a patent from the state. Even by impairing a title an oil company can prevent a stubborn land owner from leasing to another.

Petitioner's two suits were in effect one — for equitable relief. Courts of equity traditionally gave additional relief at law in order to do full justice. And equitable relief was asked, not to avoid limitation statutes, but to get the land back.

At least the plea for a declaration of a constructive trust and recovery of the lease money paid Bryant, was for equitable relief. In Texas a litigant can recover under the constructive trust theory on suit brought within four years even though his legal remedy is barred

by the two year statute. In *Peak v. Berry*, (1944) 143 Tex. 294, 184 S.W. 2d 272, the Texas Supreme Court applying Art. 5529 gave relief under the constructive trust theory even though the lower appellate court held legal relief was barred by the two year statute, Peak v. Berry, 181 S.W. 2d 116.

4. The decision below conflicts with O'Sullivan v. Felix, (1914) 233 U.S. 318, 34 S. Ct. 596, 58 L. Ed. 980, and other civil rights decisions of the Fifth Circuit Court, in failing to apply the same limitation statute as would be applied in a similar wrong not a civil rights violation.

5. The decision below decides an important question of Federal law—the method of determining what state statute of limitation to apply to a civil rights suit—that is unsettled and should be ruled on by the Supreme Court.

The Court in O'Sullivan v. Felix held that the Louisiana Limitation Statute, applicable to personal injury suits, should be applied to a civil rights suit for damages for personal injuries.

In *Beard v. Stephens*, (1967) 372 F. 2d 685, an Alabama case, the Fifth Circuit Court applied the same limitation statute to a civil rights case that the state courts would apply to similar wrongs in a non civil rights case.

In *Jackson v. Duke*, (1958) 259 F. 2d 3, a Texas civil rights case and upon which among others petitioner relied in delaying suit, the Fifth Circuit Court did not say that defendant's liability was created by the Civil

Rights Act, it said that in a suit for personal injuries brought under the Civil Rights Acts the Texas Limitation Statute governing suits for personal injuries should be applied. Petitioner believes the Circuit Court should be consistent, as least in a single state, and not change from a similar injury basis to all civil rights liabilities are created by statute basis, of determining which limitations to apply.

A wrong committed under color of law is more serious, and harder to redress than a similar wrong committed by private citizens. Over the years some courts have departed from the similar non color of law injury method of selecting a limitation statute to apply, of the O'Sullivan case, and applied a liabilities created by statute, or some other general statute in order to lengthen the limitation period. As a result there is confusion. Litigants should know in advance when their cause will be cut off.

As far as petitioner can determine the present case is the first one in which a court picked a shorter general limitation statute than would be applied to a similar non color of law wrong, which is inconsistent with the principle, victims of civil rights violations should have more time to bring suit.

There is no liabilities created by statute limitation law in Texas. All "action at law, suit in equity, or other proper proceeding for redress" suits of 42 U.S.C.A., Section 1983, should not be lumped under the 2 year action

for debt limitation law, Article 5526. If one limitation is to be applied to all civil rights suits in Texas, it should be Article 5529, "Every action * * * for which no limitation is otherwise prescribed shall be brought within four years." That is what was done in Illinois by the Seventh Circuit in *Wakat v. Harlib*, 253 F. 2d 59, there being no "liability created by statute" limitation law in Illinois.

6. The decisions of the courts below was a gross miscarriage of justice.

All McGuire asked back in 1962 and 1963 was that defendants pay a fair price for a lease on his lands and that none of his lands be taken and sold to Bryant. Defendants' position back in 1962 and 1963 was that they had located a favorable drilling site on McGuire's section 72, they were going to take most of section 72 including this favorable site, defendants would pay McGuire for a lease on that part of section 72 they let him keep, the least valuable part.

In effect McGuire only had a one half interest in the oil and gas of section 72; he was agent for the state for the other half. If he had made any deal with defendants whereby he agreed to let them take part of 72 he would be betraying his agency and in effect be joining in the conspiracy to defraud the state, himself and other small owners. McGuire did the only thing he could, file a suit to enjoin the sale which became a suit to cancel the sale after the Land Commissioner sold the land to Bryant on June 24, 1963.

The case remanded, it was April 23, 1965 before the District Court gave McGuire permission to enter on Bryant's lands, to make his survey. From then until the hearing before the Special Master in April 1966 McGuire spent most of his time surveying. The magnitude of the surveying and legal work involved is shown by the surveying exhibit, the Special Master's report, exhibits in the original record, and the six weeks hearing before the Special Master. Defendants should be required to pay for this work.

While McGuire's land was in title and possession of Bryant and the Gulf, Bryant collected lease money and the Gulf destroyed the speculative mineral value by drilling. Defendants returned the land in June 1967 when it was worth only a fraction of its value when taken. Petitioner should be compensated for this decline in value.

Relying on the authorities cited in this petition, McGuire waited until he could correctly assess his loss, which he had a right to do, before filing suit.

The money expended by defendants for legal work in an effort to keep the land they had taken from McGuire, was an effort to prolong and increase the wrong. And defendants did not make an honest attempt to buy vacant land. McGuire alleged they conspired to and did take his land by making a dishonest survey, and this issue has never been tried, the District Court saying: (Appendix p. A-26)

> "* * * and the Court further finds that the relief sought by plaintiff does not depend in any degree, upon a trial of this issue, (conspiracy) since the case may properly be disposed of on the determination of the questions of the ownership of the plaintiff's land and upon the matter of whether the survey of defendant Perry Thompson is a correct survey."

McGuire did not bring this suit or prolong this controversy for his enjoyment as found by the district court. He merely objects to defendants enriching themselves by using the power of the State to take land from petitioner, other small land owners, and the public.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court.

Respectfully submitted,

L. L. McGuire

L. L. McGuire, petitioner
Rt. 2, Midlothian, Texas

APPENDIX

UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF TEXAS, FORT WORTH DIVISION

MEMORANDUM OPINION

L. L. McGuire, plaintiff, seeks damages under the Civil Rights Act, 92 U.S.C.A., Sections 1983, 1985 (2) and (3), for an alleged taking of his property defendants pursuant to an alleged fraudulent conspiracy to acquire certain land and to secure oil leases thereon at less than their true value[1]. He alleges violations of Article I, Section 10, and the Fourteenth Amendment to the United States Constitution. Jurisdiction is asserted under 28 U.S.C.A., Sections 1331, 1343.

Defendants are John Baker, and Perry Thompson, Registered Surveyors; Jerry Sadler, Land Commissioner of Texas; Jack Giberson, Chief Clerk of the Land Office of Texas; Gulf Oil Corporation and two of its employees, R. E. Griffith and Frank R. Bass; Bryant Williams, Executor of the M. D. Bryant Estates and Trust; and Mrs. Ethel Bryant.

Before this Court for determination are defendant's motions to dismiss for want of jurisdiction and for failure to state a claim and motions for summary judgment. Briefs and oral argument have been submitted on each motion.

The land to which plaintiff claims ownership lies in Presidio County, Texas, in the Big Bend country. For that country, the amount of land involved is a relatively small tract. Plaintiff admits that its only production value is in the oil and gas potential of the area. The barren, mountainous terrain is accessible in some parts

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[1] This suit is brought by plaintiff in proper person. He is not an attorney but stated to the Court that he studied law in his last year at Harvard, from which he holds a degree in mathematics. Throughout every proceeding mentioned in this opinion, plaintiff represented himself, as to both the legal and surveying aspects of his claims.

only by horseback or on foot, and early surveys are conflicting and incomplete. Any vacant unsurveyed land existing in the area would belong under Texas law to the Public School Fund and would be available upon application by any interested person for purchase, following a survey and a public hearing as prescribed by Article 5421c, Vernon's Texas Revised Civil Statutes.

This suit arises out of events beginning with attempted purchases in 1961 by M. D. Bryant of possible vacancies in the vicinity of the land which plaintiff claims. Pursuant to the fraudulent conspiracy alleged to have been entered into by Bryant, Gulf Oil Company and the other defendants, plaintiff alleges that Bryant made application for purchase of vacancies which would include desirable parts of land owned by plaintiff and other landowners in the area, that the Land Commissioner appointed Perry Thompson as surveyor for the purpose of conducting a fraudulent survey which would show such vacancies to exist; that Thompson conducted the survey by using "spurious monuments", changing boundaries and diminishing the size of plaintiff's holdings; that plaintiff was denied access to the results of the survey; and that he was denied a fair and adequate public hearing at which vacancies were fraudulently found to exist.

Following the hearing, plaintiff filed suit in October of 1962 in the United States Court for the Western District of Texas, Austin Division (Cause No. 1213), in which he sought cancellation of the vacancy proceedings and a permanent injunction against any sales made under the alleged fraudulent theory. Defendants named in that suit were Land Commissioner Jerry Sadler, Perry Thompson and M. D. Bryant. The suit was dismissed on June 19, 1963 for failure to state a claim upon which relief could be granted.

The trial court's dismissal was reversed by the Court of Appeals for the Fifth Circuit and the case was remanded for trial in *McGuire v. Sadler*, 337 F. 2d 902

(1964)[2]. In the interim, the Land Commissioner sold the alleged vacancies to Bryant on June 24, 1963. Bryant leased the land to Gulf Oil Corporation on July 13, 1963 and Gulf drilled two dry holes in the area in August of 1963.

On March 29, 1966, the trial court appointed a Special Master to consider the following issues: (1) whether plaintiff's title to the land in question was sufficient to maintain the suit; (2) whether the survey of Perry Thompson was substantially incorrect, and (3) whether the theory on which the survey was conducted was substantially incorrect.

The hearing before the Special Master lasted approximately six weeks. The evidence introduced therein was voluminous and the findings of fact and conclusions of law entered by the Special Master number over 130 pages. In answer to the issues submitted, he determined that plaintiff possessed sufficient title to the land in question to enable him to maintain the suit and, further, that both the survey and the theory upon which it was based were substantially incorrect.

In its judgment, dated June 13, 1967, the trial court noted that neither the evidence introduced at the hearing nor the findings of the Special Master revealed any probability of proof of a conspiracy, but found that plaintiff was entitled to judgment without the necessity of presentation of further evidence or resolution of the conspiracy issue. The judgment reflects that each of the defendants filed disclaimers of any interest in the lands and conceded that plaintiff was entitled to judgment. Adopting the findings and conclusions of the Special Master, the trial court further concluded that no vacancy existed as to the land claimed by plaintiff and

[2] In reversing, the Court held that plaintiff had stated a claim for relief for impairment of contract implicit in the original grant of land from the state through which plaintiff claimed that he had sufficiently invoked claims under the due process and equal protection clauses of the Fourteenth Amendment with regard to allegations of state action, deprivation of property and denial of a fair hearing.

ordered that the vacancy proceedings be set aside and cancelled and that the title to the property remain as it had been before the vacancy applications.

Plaintiff characterizes this action in this Court as "just an extension of the Austin suit." The original complaint was filed in this Court on April 24, 1967, prior to the date of the judgment in the Austin case. Plaintiff states in his brief that he waited until he was "fairly sure" that the purchases by Bryant would be cancelled before he filed this suit. He further explains that he never amended the petition in the Austin case to add a prayer for damages for the reason that such an amendment would have unduly complicated the issues and would have required that additional parties be brought into the case. He also contends that Gulf fraudulently concealed its drilling operations from him and that only after he had filed his original petition in this Court was he able to discover that a dry hole drilled by Gulf was on his land.

In their motions for summary judgment, defendants assert that plaintiff's cause of action is now barred under the two and four year statutes of limitations, Articles 5526 and 5529, Vernon's Texas Revised Civil Statutes. Plaintiff contends that state statutes of limitations are not applicable to this suit, or, in the alternative, that this suit is based upon an unconstitutional taking of his property and is governed by the ten year period necessary to acquire adverse possession of land. Article 5510, V.A.T.S.

There is no federal statute of limitations with regard to suits brought under the Civil Rights Act. The applicable statute is that of the State in which the Court is sitting[1]. A federal court will accept the State's interpretation of its own statutes but determine for itself the nature of the suit[2].

[1] O'Sullivan v. Felix, 233 U.S. 318, 58 L. Ed. 980 (1914); Beard v. Stephens, 372 F. 2d 685 (1967), and cases cited therein.

[2] Smith v. Cremins, 9 Cir., 308 F. 2d 187, 189 (1962).

The present suit, based upon fraud, is one for damages for the misuse and loss of use of real property. It may further be characterized as a suit for fraudulent conspiracy to deprive plaintiff of his property in violation of constitutional rights. Liability of defendants is statutory, having been created by the Civil Rights Act.

Article 5526 provides, in part: "There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description: 1. Actions of trepass for injury done to the estate or property of another. * * *4. Actions for debt where the indebtedness is not evidenced by a contract in writing."

Article 5529 provides: "Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued and not afterward."

Federal courts have construed suits for damages under the Civil Rights Act as suits based upon the statutory liability in states where a statute of limitations is made applicable to such a suit. See *Lamber v. Conrad*, 9 Cir., 308 F. 2d 571 (1962); *Smith v. Cremins*, *supra*, note 4; *Swan v. Bd. of Higher Education*, 2 Cir., 319 F. 2d 56 (1936); cf. *McIver v. Russell, D.C.Md.*, 264 F. Supp. 22 (1967). See cases cited in 98 A.L.R. 2d 1160.

Section 4 of Article 5526, concerning actions for debt, has been construed broadly to cover all types of claims which give rise to an implied or express obligation to repay.

It is well established in Texas that a suit upon an obligation or liability created by statute is an action for debt not evidenced by contract in writing and is governed by the two year statute. The two year limitation has been held to bar a suit for damages for violation of

[4] Russell v. Sarkeys, 5 Cir., 286 F. 2d 786 (1961).

statutory duties by directors of a water district[6]; a suit for overtime, liquidated damages and attorney's fees under the Fair Labor Standards Act, 29 U. S. C. A., 201, 209[7]; a suit for assessment against a stockholder of an insolvent bank[8]; a suit based upon statutory personal liability of a bank's officers for accepting deposits of the plaintiff with knowledge that the bank was insolvent[9]; and a suit for damages in addition to a condemnation award[10].

Only one court has had occasion to consider the applicability of a Texas statute of limitations to a suit under the Civil Rights Act. In *Jackson v. Duke*, 5 Cir., 259 F. 2d 3 (1958), the Fifth Circuit held that the sections of the two year statute dealing with suits for conversion of personal property and suits for personal injury applied to a suit under the Act for assault by police officers, citing Article 5526(a) and (6). No cases were cited, and no comment was made as to the applicability of any other limitations statute. However, in suits arising under similar federal statutes, courts applying Texas law have held that the debt section of the two year statute applies. See *Green v. Wilkinson*, 5 Cir., 234 F. 2d 120 (1956), (anti-trust suit); *Duncan v. Montgomery Ward & Co., Inc.*, D.C.S.D. Tex., 42 F. Supp. 879 (1941) (Fair Labor Standards Act); *Hollingsworth v. Cities Service Oil Co.*, supra, note 7.

The Court is of the opinion that this action is in the nature of a suit based upon a statutory liability; it is, therefore, governed by Section 4 of Article 5526, the two year statute. It is noted that the result will be the

[6] Port Arthur v. Tillman, 382 S.W. 2d 138 (Tex. Civ. App., Texarkana, 1966), reversed on other grounds, 398 S.W. 2d 750 (1965).

[7] Hollingsworth v. Cities Service Oil Co., 199 S.W. 2d 266 (Tex. Civ. App., Beaumont, 1947, writ ref'd.), cert. denied 322 U.S. 774.

[8] Shaw v. Burk, 61 S.W. 2d 526 (Tex. Civ. App., Dallas, 1933, writ ref'd.)

[9] Rose v. First State Bank of Paris, 122 Tex. 298, 59 S.W. 2d 810 (1953).

[10] Payne v. Tyler, 379 S.W. 2d 373 (Tex. Civ. App., Tyler, 1964, writ ref'd., n.r.e.).

same even if the action is termed merely a suit for fraudulent conspiracy or for injury to real property, since a suit for damages based upon fraud[11] or fraudulent conspiracy[12] is held to be within Article 5526 as a suit for debt, and actions for damages for injury to real property are clearly governed by Section 1 of the same statute[13].

The date upon which limitations began to run depends upon when plaintiff's cause of action accrued. *Atkins v. Crosland*, 417 S.W. 2d 150, 152 (Tex. 1967). In absence of fraudulent concealment, the general rule is as follows:

> "When an act is in itself lawful as to the person who bases an action on injuries subsequently accruing from, and consequent upon, the act, it is held that the cause of action does not accrue until the injury is substained, * * * If, however, the act of which the injury was the natural sequence was a legal injury, — by which is meant an injury giving cause of action by reason of its being an invasion of a plaintiff's right, — then, be the damage however slight, limitation will run from the time the wrongful act was committed, and will bar an action for any damages resulting from the act, although these may not have been fully developed until within a period less than necessary to complete the bar." *Houston Waterworks v. Kennedy*, 70 Tex. 233, 9 S.W. 2d 36, 37 (1958).

With respect to suits based upon fraud, it is settled that limitations will begin to run only when plaintiff has

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[11] Gordon v. Rhodes & Daniel, 102 Tex. 300, 116 S.W. 40 (1909); Price v. Haker, 419 S.W. 2d 213 (Tex. Civ. App., Dallas, 1967); Jenkins v. Kimbro, 390 S.W. 2d 189 (Tex. Civ. App., Austin, 1964, writ dism'd.)

[12] Harang v. Aetna Life Ins. Co., 400 S.W. 2d 810 (Tex. Civ. App., Houston, 1966, writ ref'd., n.r.e.); Starling v. Hill, 121 S.W. 2d 648 (Tex. Civ. App., Waco, 1938, no writ hist.).

[13] See, e.g., Tennessee Gas Transmission Co. v. Fromme, 153 Tex. 352, 269 S.W. 2d 336 (1954); Gulf Oil Corp. v. Alexander, 291 S.W. 2d 792 (Tex. Civ. App., Amarillo, 1956, writ ref'd., n.r.e.); Tietze v. Internat'l. & G.N.R. Co., 35 Tex. Civ. App. 136, 80 S.W. 124 (1904).

discovered or when, by reasonable diligence, he should have discovered the fraud[14]. However, where both fraud and the persons committing it are known, the general rule applies and the plaintiff cannot withhold suit merely for want of ability to prove the full extent of his damages, nor will the fact that actual or substantial damaged do not occur until a later date postpone the running of the statute[15].

Plaintiff does not allege concealment of his cause of action nor does he deny that he was aware of the alleged conspiracy long before this suit was filed. His amended complaint in the Austin case shows conclusively that he had knowledge, at the time it was filed, of every element of the conspiracy as well as the identity of each alleged conspirator named in this action as a defendant. His legal injury was sustained on June 24, 1965, the date upon which the vacancies later found to be on parts of his land were sold to Bryant. There was a trespass at that time. Plaintiff admits he could have added a claim for damages in the Austin suit after that time. His allegation as to the fraudulent concealment of the existence of the dry hole on his property amounts only to a claim that he was unable to discover the full extent of his damages. It did not postpone the running of the statute of limitations. Plaintiff's cause of action must be held to have accrued on June 24, 1963, and it is now barred.

The plaintiff, with his year of law and year of surveying in college, has taken on and whipped experts in

[14] Houston v. Home & Wise, 373 S.W. 2d 781 (Tex. Civ. App., Houston, 1963, writ ref'd., n.r.e.); Anderson v. Wise, 345 S.W. 2d 803 (Tex. Civ. App., Eastland, 1961).

[15] Burnham v. Todd, 5 Cir., 139 F. 2d 338 (1944); Daniels v. Conrad, 331 S.W. 2d 411 (Tex. Civ. App., Dallas, 1959, writ ref'd. n.r.e.); Guinn v. Press, 135 Tex. 60, 140 S.W. 2d 438 (1940); 128 A.L.R. 757; Gulf Refining Co. v. Nabors, 134 S.W. 2d 843 (Tex. Civ. App., Amarillo, 1939, no writ hist.); Collins v. Griffith, 125 S.W. 2d 419 (Tex. Civ. App., Amarillo, 1938, writ ref's.); American Indemnity Co. v. Ernest & Ernest, 106 S.W. 2d 763 (Tex. Civ. App., Waco, 1937, writ ref'd.); Tietze v. Internat'l. & G.N.R. Co., supra, note 13, cf., Atkins v. Crosland, supra).

each of those fields. He is enjoying to the hilt the prospect of continued competition with them. While he is to be admired for the job he has done representing himself legally and as a surveyor in this litigation, already overburdened federal courts cannot indulge him the luxury of piecemealing his litigation for the purpose of stringing it out for his enjoyment as if it were a newly found toy. The plaintiff has had his day in court — six weeks of them on the last go-around. This claim for damages could and should have been asserted in the case in the federal court at Austin. Nothing would be gained by a lengthy trial where the plaintiff's own pleadings in this case show that his claims for damages is barred by the two year statute of limitations of this State.

Judgment will be entered in accordance herewith.

Signed this 28th day of April, 1969.

LEO BREWSTER

Judge

JUDGMENT

The various motions of the several defendants herein were presented the Court in a hearing held after due notice, with the plaintiff appearing pro se and the attorneys of record for each of the other parties present and participating. Extensive oral arguments were heard. The Court is of the opinion that the plaintiff's claim for damages if barred by the Texas two year statute of limitations.

It is therefore ordered that this action be hereby dismissed on the ground that it is barred by such two year statute of limitation, at the plaintiff's cost.

Signed this 28th day of April, 1969.

LEO BREWSTER

Judge

In The

United States Court of Appeals

For The Fifth Circuit

No. 27894
Summary Calendar

L. L. McGUIRE,
Plaintiff-Appellant,

versus

JOHN F. BAKER, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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(January 26, 1970)

Before BROWN, Chief Judge, MORGAN and CARSWELL, Circuit Judges.

BROWN, Chief Judge: This suit arises out of events beginning with the attempted purchase in 1961 by M. D. Bryant of possible vacancies in the vicinity of land claimed by plaintiff, L. L. McGuire, in the Big Bend country of West Texas. Pursuant to provisions of Texas laws[1] a hearing was held and the vacancies were found to exist.

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[1] The procedure is set out in V. A. T. S. Art. 5421c §6.

Following this hearing McGuire filed a suit in the United States District Court for the Western District of Texas, Austin Division in which he alleged that the vacancy proceeding was conducted and the vacancy declared pursuant to a fraudulent conspiracy participated in by the officials of the General Land Office of the State of Texas, Bryant, Gulf Oil Corporation and its employees. The suit was dismissed on June 19, 1963 and appeal was taken by McGuire.

This Court reversed the dismissal, *McGuire v. Sadler*, 5 Cir., 1964, 337 F. 2d 902, and remanded the case for trial. The land had, however, been sold on June 24, 1963 to Bryant and leases for the production of oil and gas had been granted to Gulf Oil Corporation, who drilled two dry holes.

After the remand, the District Court in Austin on March 29, 1966 appointed a Special Master. Then, after a hearing that lasted six weeks, the Special Master reported that the survey upon which the declaration of a vacancy had been based was incorrect. His report was adopted and the vacancy proceeding was set aside by a judgment of the District Court dated June 13, 1967. Thus that suit came to an end with McGuire having cleared his title to the land.

McGuire, however, had on April 24, 1967 filed the present action. In this action he seeks damages for the destruction of the speculative value of his property as a result of the dry holes drilled by Gulf, he seeks to recover the money paid by Gulf to Bryant[2] for the

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[2] Bryant died during the course of this litigation and his estate and heirs are now defendants.

leases, and he seeks legal and surveying fees.[3] This relief is sought under 43 U.S.C.A. §§ 1983, 1985,[4] which give a remedy for state action that deprives persons of federal Constitutional and statutory rights. In addition, McGuire claims to have a direct remedy under the Constitution, specifically Article I, Section 10[5] and the Fourteenth Amendment.

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[3] McGuire has acted as his own attorney throughout this litigation as well as doing his own surveying.

[4] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C.A. §1983

"(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators." 42 U.S.C.A. §1985

[5] Article I., Section 10 provide:

"No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

McGuire claims his right under the contract clause.

The defendants responded to this damage action by motions to dismiss on the pleadings and motions for summary judgment. After a hearing the District Court granted their motions for summary judgment. The Court concluded that McGuire's action for damages had been barred by limitations. Specifically, the District Court held that the claim arose on June 24, 1963 when the vacancies were sold to Bryant and that the Texas two year statute of limitations[6] was applicable. We agree and affirm.[7]

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[6] "There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions of trespass for injury done to the estate or the property of another.

2. Actions for detaining the personal property of another, and for converting such property to one's own use.

3. Actions for taking or carrying away the goods and chattels of another.

4. Actions for debt where the indebtedness is not evidenced by a contract in writing.

5. Actions upon stated or open accounts, other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant, their factors or agent. In all accounts, except those between merchant and merchant, as aforesaid, their factors and agents, the respective times or dates of the delivery of the several articles charged shall be particularly specified, and limitation shall run against each item from the date of such delivery, unless otherwise specially contracted. Acts 1841, p. 163; G.L. vol. 2, p. 627.

6. Action for injury done to the person of another.

7. Action for injury done to the person of another where death ensued from such injury; and the cause of action shall be considered as having accrued at the death of the party injured. Acts 1897, p. 12; Acts 1841, p. 163; Acts 1852, p. 128; P.D. 4604; G.L. vol. 10, p. 1066; G.L. vol. 2, p. 627; G.L. vol. 3, p. 1006.

8. Actions of forcible entry and forcible detainer."

V. A. T. S. Art. 5526.

[7] Pursuant to Rule 18 of the rules of this court, we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the clerk to place the case on the Summary Calendar and to notify the parties in writing. See Huth v. Southern Pac. Co., 5 Cir., 1969, ... F. 2d ....., Part I [No. 27439, Oct. 7, 1969]; Murphy v. Houma Well Service, 5 Cir., 1969, 409 F. 2d 804, Part I.

It is well established that when, as here, Congress has provided no period of limitation for a federal claim, the federal courts must borrow the applicable statute of limitations from the state in which it sits. *O'Sullivan v. Felix*, 1914, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980; *Beard v. Stephens*, 5 Cir., 1967, 372 F. 2d 685.[8] This borrowing is a two-step process. First, the essential nature of the federal claim must be determined. Secondly, the state law must be looked to in order to determine which state statute is applicable to claims like the one the Court has determined it is presented with. *Beard v. Stephens, supra; Moviecolor Limited v. Eastman Kodak Co.*, 2 Cir., 1961, 288 F. 2d 80, cert. denied, 368 U.S. 821, 82 S.Ct. 39, 7 L.Ed 2d 26; *Bertha Building Corp. v. National Theatres Corp.*, 2 Cir., 1959, 269 F. 2d 785, cert. denied, 1960, 361 U.S. 960, 80 S.Ct. 585, 4 L.Ed. 2d 542.

Although McGuire argues that his action is essentially of an equitable nature to impose a constructive trust on the proceeds of the lease from Bryant to Gulf, it seems clear that it is really to recover damages under 42 U.S.C.A. § 1983 and 42 U.S.C.A. § 1985 or for trespass under the *Humble Oil & Refining Co. v. Kishi*, Tex. Comm. App., 1927, 276 S.W. 190 theory.[9] In either case the Texas two-year statute of limitation applies. If it is considered to arise under 42 U.S.C.A. § 1983 or § 1985, it would come under § 4 of V.A.T.S. Art. 5526, (see note 6, *supra*), *Jackson v. Duke*, 5 Cir., 1958, 259 F. 2d 3, since it is well established by Texas

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[8] In *Beard*, this Court pointed out that this borrowing process had to be applied to cases brought under 42 U.S.C.A. §1983 and §1985 since neither "in the Civil Rights Acts * * * nor elsewhere in the federal statute is there an applicable limitation provision." See also Knowles v. Carson, 5 Cir., 1969, ... F. 2d ..... [No. 27881, Nov. 7, 1969]; Hileman v. Knable, 3 Cir., 1968, 391 F. 2d 956; Swan v. Board of Higher Education, 2 Cir., 1963, 319 F. 2d 56; Mohler v. Miller, 6 Cir., 1956, 235 F. 2d 153.

[9] Even if it is assumed that McGuire can assert such a theory here because of the constitutional claim, the essentially trespass character of the claim is not changed. Cf. Foster v. City of Detroit, 6 Cir., 1968, 405 F. 2d 138.

law that liability created by statute is an action for debt for limitation purposes. See e.g., *Cowart v. Russell*, Tex. 1940, 144 S.W. 2d 249; *Hamilton v. Board of Fireman's Relief and Retirement Fund Trustees*, Tex. Civ. App., 1966, 408 S.W. 2d 781, writ ref. n.r.e. And, if it is action for trespass, the statute is explicit (V. A. T. S. Art. 5526 § 1, see note 6, *supra.*) Moreover, the plea for recovery of the money paid by Gulf to Bryant is just part of the total claim for damages under 42 U.S.C.A. §§ 1983 and 1985. And, if it is considered to have some quasi-common-law basis, it would still be one for debt or on an account and barred by the two-year statute of limitation. *Ferguson v. Ferguson*, Tex. Civ. App. — Austin, 1944, writ ref. w.m., 181 S.W. 2d 601; *Zarnba v. Boethel*, Tex. Civ. App. — Corpus Christi, 1965, 393 S.W. 2d 716; *Clanton v. Community Finance & Thrift Corp.*, Tex. Civ. App. — Eastland, 1953, 262 S.W. 2d 252.

The District Court was also correct in its determination of when the statute of limitation began to run. The rule in Texas is that limitations run from the date of the commission of the wrong. *Houston Waterworks v. Kennedy*, Tex. 1888, 8 S.W. 36. And here, under whatever characterization of the essential nature of the claim that may be used, the wrong occurred where McGuire lost possession through the sale of the supposed vacancies to Bryant and the leasing of the property to Gulf. This all occurred on June 24, 1963.

Although placing heavy reliance upon the fraudulent-concealment exception to the general limitations rule, McGuire cannot shield himself with that doctrine since he knew of the activities of all the defendants at the time the claim arose. He was actually engaged in litigation over the title to the property during the entire

time limitations were running.[10] McGuire also claims that he could not have known the extent of his damages in the summer of 1963 since the wells Gulf was drilling had not yet proved to be dry holes. He did, however, know of Gulf's activity and he knew injuries were being done. Under such circumstances it is clear that the running of the statute of limitation is not postponed. *Burnham v. Todd*, 5 Cir., 1944, 139 F. 2d 338, 342.

Thus the District Court was correct in all aspects of its determination as to the applicability of the bar of limitations. McGuire has had many opportunities to right the wrong he claims was done him. But, he chose only to get his land back. The law regards it as a case in which he has slept on his claims for other relief.

AFFIRMED.

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[10] The piecemeal approach to this litigation taken by McGuire is illustrated by the following portion of the transcript of the hearing held in the present action:

"THE COURT: When did you get back into district court down there?

MR. McGUIRE: Then it came back in the fall of 1964. Your Honor.

THE COURT: Then why didn't you sue for damages then?

MR. McGUIRE: Well, Your Honor, I expected the case to be tried fairly soon, and since there were other parties that I thought were liable for the damages, I did not want to complicate the case and I didn't see any necessity for it.

THE COURT: You knew you could have brought them in and made them parties to that suit and you could have asked for damages if you had wanted to?

MR. McGUIRE: Well, I hadn't — I could have asked but I just didn't feel —

THE COURT: — You didn't think it was the judicious thing to do?

MR. McGUIRE: Well, how would I know that the Court would hold with me? In fact, there was a good chance that this case — that I would have lost the case down there and I didn't feel that the — the case was all very, very complicated and I didn't want to make it any worse at that time until I knew that the court would hold with me. I did not know that the court would decide that the patents to Mr. Bryant should be cancelled."

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

January 26, 1970

In The

United States Court of Appeals

For The Fifth Circuit

No. 20736

L. L. McGUIRE,

Appellant,

versus

JERRY SADLER, LAND COMMISSIONER, ET AL.,

Appellees.

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337 F 2d 902

Appeal from the United States District Court for the Western District of Texas.

(October 19, 1964.)

Before TUTTLE, Chief Judge, RIVES, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: The district court dismissed this case for want of jurisdiction. We reverse.

L. L. McGuire, the plaintiff-appellant, brought suit in proper person against Jerry Sadler, the Land Commissioner of Texas, and a number of other defendants. In a 27-page complaint McGuire alleged that he is the owner of certain land in Presidio County which the Commissioner, under color of law, is about to sell as part of a conspiracy to deprive him of his land and to deprive others similarly situated of their land because of newly found mineral potential in the county.

Presidio County is on the Rio Grande River in a sparsely developed region in southwest Texas. The surveys of the area are old and of questionable reliability. Texas law provides that any vacant land never sold by the State belongs to the Texas School Fund.

Under Texas Civil Statutes (Vernon's 1948), Art. 5421c, any person interested in purchasing unsurveyed, vacant School Fund land may apply to the Land Commissioner for purchase of the land. The law requires the Land Commissioner to appoint a surveyor to survey the land and to give public notice to all interested parties, including the owners of the abutting land. If, after a public showing of the survey for a statutory period and after a public hearing, the Land Commissioner should determine that the land is not privately owned, the applicant may purchase the land at a price set in accordance with the statute. Any party aggrieved by the proceedings before the Land Commissioner may file suit, in accordance with Art. 5421c-6j, in the Texas District Court for the county in which the land is located. In such a suit the Attorney General intervenes for the State and any final judgment is binding upon the State.

According to the complaint, M. D. Bryant, a member of the alleged conspiracy, filed three applications to purchase vacant School Fund land in Presidio County. The plaintiff alleges that Sadler, the Commissioner, knew of the plot to defraud the plaintiff and hired one Perry Thompson a professional surveyor, for the purpose of preparing a fraudulnt survey based on "spurious monuments". This survey, so the plaintiff says, changes many boundaries, diminishes the size of the plaintiff's holdings, and leaves him with the least desirable part of what he originally owned. At the hearing, over the plaintiff's objections, the Commissioner determined that the land in question was indeed Texas School Fund Land. Accordingly, the Commissioner sold some of it to Bryant and his co-conspirators. The

plaintiff chose not to follow his statutory remedy in the Texas courts. Instead, he filed this suit praying for rescission of the original sales and for an injunction against the sale of land within the Thompson survey. The plaintiff cast the suit in the form of a class action brought on behalf of all of the absentee owners in Presidio County similarly deprived of their property as a result of this allegedly fraudulent survey.

The standards generally applicable to notice pleading require little specificity for a complaint filed in the federal court, except that a claim based on fraud must be supported by specific allegations. Although the pleading here is inartistic, long-winded and, in some of the paragraphs, vague, we cannot say that the complaint must be dismissed for failure of the plaintiff to allege his claim with sufficient precision. Taking the complaint as a whole, at least four issues of fact emerge: (1) was the Thompson survey incorrect? (2) was the survey purposefully false? (3) was the action of the Land Commissioner fraudulent or in bad faith? and (4) were there procedural improprieties in the hearing before the Commissioner which deprived the plaintiff of a fair opportunity to protect his property? Accepting as true the allegations of the complaint with respect to these issues, the district court had jurisdiction of the matter in controversy as one that "arises under the Constitution, laws, or treaties of the United States". 28 U.S.C.A. § 1331. Under 42 U.S.C.A. § 1983, the court had jurisdiction by virtue of 28 U.S.C.A. § 1343(3). *Hornsby v. Allen*, 5 Cir. 1964, 326 F. 2d 605. The relief requested rests in the general equity powers of the Federal judiciary. *Holmberg v. Armbrecht*, 1946, 327 U. S. 392, 66 S. Ct. 582, 90 L. Ed. 743; 3 Davis, Administrative Law Treatise 310 et seq. § 23.05.

It must be said that this case has many of the aspects of a local boundary dispute. The plaintiff, however, presents a claim of impairment of contract under Article 1,

Section 10 of the United States Constitution.[1] The plaintiff asserts that the state action of selling what is rightfully his land to Bryant and his co-conspirators is an impairment of the contract implicit in the original grant of the land from the state to his predecessors in interest, through whom he claims. The legal basis for this contention stretches back to *Fletcher v. Peck*, 1810, 6 Cranch, 10 U. S. 87, 3 L. Ed. 162, in which John Marshall dissected a land grant and concluded that, although it was an executed contract (a conveyance), it was also a contract carrying with it certain continuing executory obligations, including the grantor's obligation not to claim again the thing granted. Justice Marshall said:

> "A contract is a compact between two or more parties and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant." 6 Cranch at 136-137.

The vitality of Section 10 had faded,[2] but in the restricted area of state land grants the section still has

---

[1] Article 1, Section 10.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

[2] "[T]he clause nowadays no longer interferes with the power of the States to protect the public health, safety, and morals, or even that larger interest which is called the 'general welfare', for the simple reason that a State has no right to bargain away this power." Corwin, The Constitution and What it Means Today 82 (1954).

some vigor left.[1] The unconstitutionality of state action which grants land to one party and then attempts to grant the same land to another, was reasserted in 1873 in *Davis v. Gray*, 1873, 16 Wall. (83 U.S. 203, 21 L. Ed. 447 and in 1941 in *Wood v. Lovett*, 1941, 313 U.S. 362, 61 S. Ct. 983, 85 L. Ed. 1404. If the Land Commissioner caused the State to sell land properly within the original patent through which the plaintiff claims, such action would seem to fit within the constitutional proscription. Under *Fletcher v. Peck* a land grant carries the obligation on the part of the State, as on the part of any other grantor, not to repudiate a valid conveyance.

Quite apart from the question of impairment of contract, the plaintiff's Fourteenth Amendment claim stands on its own feet. There is no question that there was state action for the purpose of invoking the Fourteenth Amendment. *Monroe v. Pape*, 1961, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492; *Hornsby v. Allen*, 5 Cir. 1964, 326 F. 2d 605. And there is deprivation of property—if we accept plaintiff's allegations. The fraud of the Commissioner, if a fact, would be enough to require the nullification of his findings and subsequent action. In addition, the plaintiff alleges various procedural shortcomings in the state proceedings. He alleges that he was denied the time and access to information needed in order to defend his interest; that the Commissioner and the co-conspirators used various unfair stratagems during the hearing in order to prevent his being heard; that the Commissioner was present at the hearing for only a few minutes, which resulted in a clerk (the Chief Clerk) conducting the hearing. If such procedural shortcomings are found to have existed and if indeed they deprived the plaintiff of a fair and adequate hearing, this would seem sufficient for a showing of a Fourteenth Amendment violation.

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[1] See Note, The Contract Clause of the Federal Constitution, 32 Col. L. Rev. 476 (1932); Hale, The Supreme Court and the Contract Clause, 57 Harv. L. Rev. 512, 621 (1944).

The plaintiff also invokes the equal protection clause of the Fourteenth Amendment. He employs the words "fraudulent" and "wilful" not just opprobriously but to show allegedly purposeful discrimination. The allegations of fraudulent and discriminatory official action are made with specificity so as to bring the plaintiff within even the conservative definition of equal protection announced in *Snowden v. Hughes*, 1944, 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497. See also *Hornsby v. Allen*, 5 Cir. 1964, 326 F. 2d 605.

It is not clear that the plaintiff has an effective alternative remedy in the state courts of Texas, and as a matter of law the existence of such an alternative provides no basis for denying jurisdiction. *Home Telephone & Telegraph Co. v City of Los Angeles*, 1913, 227 U. S. 278, 33 S. Ct. 312, 57 L. Ed. 510; *Lane v. Wilson*, 1939, 307 U. S. 268, 59 S. Ct. 872, 83 L. Ed. 1281; *Monroe v. Pape*, *supra*. Nor can this action be barred under the Eleventh Amendment as a suit against the state. By a wholesome fiction, a credit to fictions which Bentham would have endorsed, a suit against a state officer for injunctive relief is regarded as a private suit, if the threatened action constitutes a deprivation of the plaintiff's basic federal constitutional rights. *Ex Parte Young*, 1908, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714; *Georgia R.R. & Banking Co. v. Redwine*, 1952, 342 U. S. 299, 72 S. Ct. 321, 96 L. Ed. 335.

The plaintiff has made sweeping statements on the constitutionality of Art. 5421c. In substance, however, he attacks only the application of the statute to the facts in question. In these circumstances, a three-judge Federal court need not be convened. *Phillips v. United States*, 1941, 312 U. S. 246, 61 S. Ct. 480, 85 L. Ed. 800.

The loosely drawn complaint filed in this case contains shocking charges which may be difficult for the plaintiff to substantiate before a fact finder. The plaintiff's answers to interrogatories indicate that he is not possessed of a great quantity of fortifying evi-

dence. Nevertheless, accepting as true the allegations of the complaint, the district court has jurisdiction, and the plaintiff is entitled to his day in Federal court.

We REVERSE.

United States District Court

WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL NO. 1313

L. L. McGUIRE,

Plaintiff

vs.

JERRY SADLER, TEXAS LAND COMMISSIONER, ET AL.,

Defendants

JUDGMENT

This cause having heretofore been submitted to a Special Master, and the report of the Special Master, together with his Findings of Fact and Conclusions of Law having been filed herein; and it being made known to the Court that defendant M. D. Bryant is dead, and Bryant Williams, as Independent Executor of the Estate of M. D. Bryant, Deceased, and as Trustee of the Bryant Family Trusts, having appeared, he is ordered substituted as a proper defendant herein. And the Court being further advised that the widow of M. D. Bryant, Mrs. Ethel C. Bryant has also appeared herein as a defendant; and that the said Bryant Williams, in his stated capacities, together with Mrs. Ethel C. Bryant, defendant Jerry Sadler and defendant Perry Thompson have made and filed herein their disclaimers of any further interest, right or title in the subject lands, and having conceded that plaintiff is entitled to a judgment and the Court having duly called this case for announcements, the Court is of the opinion that in this case the presentation of additional evidence by the plaintiff is unnecessary to afford plaintiff a judgment as prayed for by him in his amended complaint. The

Court is of further opinion that the evidence adduced in this case as a result of extensive discovery proceedings fails to indicate any probability of proof of conspiracy on the part of any of the defendants, and none is reported in the findings of the Special Master, and the Court further finds that the relief sought by plaintiff does not depend in any degree, upon a trial of this issue, since the case may properly be disposed of on the determination of the questions of the ownership of the plaintiff's land and upon the matter of whether the survey of defendant Perry Thompson is a correct survey.

The Findings of Fact and Conclusions of Law of the Special Master are adopted by the Court as its Findings of Fact and Conclusions of Law, and it is therefore,

ORDERED, ADJUDGED, AND DECREED BY THE COURT that final judgment in favor of the plaintiff and against the defendants is hereby granted and ordered entered in this action as follows:

1.

All proceedings in the land vacancy applications of M. D. Bryant, Nos. S. F. 16105, 16106, 16107, Presidio County, Texas, including but not limited to, the applications, hearings, decisions of the Land Commissioner, awards, sales, and patents, the record of the awards in the Presidio County Deed Records in Vol. 165, at pages 245, 246, and the record of the patents in Vol. 127, Patent Records Presidio County, at pages 537-549, the Perry Thompson surveys, reports, plats, field notes, be and the same are declared to be null and void and are cancelled and set aside in their entirety.

2.

All lands in Presidio County, between the senior blocks, Texas & Pacific Ry. 2 and 5 on the west and Dennison & Pacific Ry. 3, Galveston, Harrisburg & San Antonio Ry. 12, Texas Mexican Ry. 1, and Martha A. Martin on the east, are part of and included in Texas Mexican Ry. Block 2, sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22,

27, 28, 29, 30, 31, 32, 37, 38, 39, 40, 41, 42, 47, 48, 49, 50, 51, 52, 61, 62, 71, 72, 75, 76, 93, 94, 95, 96. And there are no vacant unsurveyed lands as defined by Article 5421c, Vernon's Texas Civil Statutes between the above mentioned senior blocks. Provided, however, that this judgment shall not be construed as an adjudication of the rights of any person, association or concern not a party of record in this cause.

3.

All such described vacancy proceedings are declared to be of no force and effect, and the title to the subject lands, including plaintiff's title to those parts of sections 7, 51, 95 and the surface of section 72, Texas Mexican Block 2, Presidio County, Texas, shall be and remain precisely the same as if the herein described vacancy proceedings had never taken place, and the patents issued pursuant thereto had never been issued or granted.

4.

All other relief prayed for by any party hereto and herein not specifically granted is denied.

5.

Plaintiff is awarded all costs of suit, and all said costs, including those stood by the plaintiff on the former appeal of this case, and costs of reference proceedings, are taxed against defendants, jointly and severally.

6.

The report of the Special Master, John J. McKay is received and approved, and the compensation for his services is hereby fixed in the amount of Six Thousand ($6,000.00) Dollars, and it is Ordered that this sum shall be paid to him within ten (10) days of entry of this judgment by the defendant, Bryant Williams, Independent Executor of the Estate of M. D. Bryant, Deceased and Trustee of the Bryant Family Trusts. It appearing that plaintiff, defendant Sadler

and defendant Bryant have heretofore deposited the sum of One Thousand ($1,000.00) Dollars each in the Registry of the Court toward costs of reference proceedings, out of which court reporter fees have been paid, the Clerk shall return to plaintiff $1,000.00 and remit the balance to the Estate of M. D. Bryant; and the latter shall have the right to an accounting among other defendants for their pro rata portions of costs.

Signed and Ordered entered of record this 13th day of June, 1967.

JACK ROBERTS
United States District Judge

REME COURT, U. S.

Office Supreme Court, U.S.
FILED
JUN 12 1970
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 182

L. L. McGUIRE,

Petitioner,

v.

JOHN F. BAKER, et al.,

Respondents.

BRIEF OF RESPONDENTS GULF OIL CORPORATION R. E. GRIFFITH AND FRANK R. BASS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1608

L. L. McGUIRE, *Petitioner,*

v.

JOHN F. BAKER, et al., *Respondents.*

BRIEF OF RESPONDENTS GULF OIL CORPORATION R. E. GRIFFITH AND FRANK R. BASS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

May It Please The Court:

STATEMENT OF THE CASE

The statement of the case set forth in the petition for writ of certiorari is in some respects incomplete insofar as the matters concerning these respondents are concerned.

Respondent Gulf Oil Corporation is a Pennsylvania corporation engaged in the exploration for and production of oil and gas. Respondent R. E. Griffith is now, and was at the time of the occurrence of the events alleged by McGuire, the District Landman of Gulf's Midland District. Respondent Frank R. Bass has been employed by Gulf as a landman since 1954. These three respondents are hereinafter referred to as "Gulf."

Gulf began the acquisition of leases in Presidio County, Texas, in 1957 and obtained leases from various owners of mineral interests. It offered to purchase leases from petitioner on the lands in Sections 51, 72 and 95, Block 2, Texas Mexican Railway Co. Survey, in which petitioner claimed an interest at a price well in excess of the mineral value per acre thereof first alleged by petitioner. (Appendix below, pages 35, 61) However, petitioner declined to lease any of the lands in which he claimed to have an interest. Certain tracts of land including portions in which McGuire claimed an interest were found to be vacant, unsold public lands by the Land Commissioner of Texas in 1963, and were sold by him to M. D. Bryant. Gulf purchased an oil and gas lease from Bryant on those lands, and in 1963 drilled a well in the general area. The well resulted in a dry hole and there has been no commercial production of oil and gas therefrom.

Following the vacancy hearing before the Land Commissioner petitioner filed suit in October of 1962 in the United States District Court for the Western District of Texas, Austin Division (Cause No. 1313), seeking a cancellation

of the vacancy proceedings and a permanent injunction against the sale of the lands, alleging among other things a fraudulent conspiracy, commencing in 1961, to deprive him of his lands. While Gulf was alleged to have participated in the conspiracy, McGuire did not make them parties to that suit. (Appendix below, pages 47-68)

On June 19, 1963, the suit in the Austin court was dismissed for failure to state a claim upon which relief could be granted. This was reversed by the Court of Appeals for the Fifth Circuit and remanded for trial in 1964.[1] Thereafter in 1966 the trial court appointed a special master to consider issues concerning plaintiff's claim to the land there in question and whether the survey upon which the vacancy finding was based was substantially incorrect.

After a six weeks hearing before the special master it was determined that petitioner possessed sufficient title to the land to enable him to maintain the suit and that the survey was substantially incorrect. The Bryant defendants then disclaimed any interest to that land. By judgment entered on June 13, 1967, the trial court in Austin concluded that no vacancy existed as to the land claimed by McGuire and set the vacancy proceedings aside. He further held that neither the evidence introduced at the hearings nor the findings of the special master revealed any probability of proof of conspiracy. (Petition Appendix, page A-26)

In April of 1967, prior to the entry of that judgment in the Austin court, petitioner filed this action in the United States

[1] McGuire v. Sadler, 337 F.2d 902 (5th Cir. 1964).

District Court for the Northern District of Texas, Fort Worth Division. This complaint was filed against the same defendants as in the Austin case and against the Gulf defendants and others. Petitioner here alleged that his action arose under Article 1, Section 10, and the Fourteenth Amendment to the United States Constitution and 42 U.S.C. sections 1983, 1985 (2), (3), (1970), the Civil Rights Act. He claimed jurisdiction under 28 U.S.C. sections 1331, 1343 (1966). (Appendix below, pages 2-3) No claim of jurisdiction by reason of diversity of citizenship under 28 U.S.C. section 1332 (1966) was alleged or shown. Here McGuire alleged substantially the same facts as in the Austin case. For relief he asked that a constructive trust be impressed upon the moneys paid by Gulf in 1963 to M. D. Bryant for the lease on the lands covered by the vacancy award, and for damages for the alleged destruction of the speculative mineral value of his land and his time and money spent in surveying and in litigating the Austin case.

In the original complaint here McGuire asserted that the well drilled by Gulf in 1963 was on lands adjoining his land. (Original complaint, par. 36) That it was drilled on lands not claimed by him is correct. Although petitioner here admits at pages 12 and 19 of his petition that he surveyed his lands in 1965 and 1966, which was before he filed his original complaint in the Fort Worth court in 1967, he thereafter amended his complaint to contend that the well was drilled on land claimed by him in Section 72 of the Texas Mexican Railway Co. Survey. (Appendix below, page 13)

The trial court sustained respondents' motions for summary judgment, holding that petitioner's claims were now barred by the Texas two-year statute of limitation, Tex. Rev. Civ. Stat. Ann. art. 5526 (1958) and could and should have been asserted in the Austin case. (Petition Appendix, page A-9) The Court of Appeals for the Fifth Circuit affirmed. (Petition Appendix, page A-10)

ARGUMENT

The courts below properly applied the law governing this case and correctly disposed of petitioner's contentions which have any substance.

A. Petitioner has no Direct Cause of Action Against Gulf Under the Constitution of the United States.

McGuire contends at page 9 of his petition that both lower courts "held in effect that McGuire has no direct remedy under the Constitution [of the United States] and that this is only a civil rights suit." As a reason for granting the writ, at page 11, he further asserts a conflict with the decision of the court of appeals below on the appeal from the Austin case stating that the court there "held that McGuire had a cause of action under both the Contract Clause and the Fourteenth Amendment. * * *"

We do not understand the courts below to have so held in this case. However, if they did, the holdings were correct. This is particularly true as to the Gulf respondents. Neither do we understand the court of appeals to have so held in the Austin case. Rather, in that case, where different relief was sought as against defendants other than Gulf, the court

stated that petitioner "presents a claim of impairment of contract under Article 1, Section 10 of the United States Constitution." (Petition Appendix, page A-20)

McGuire thus continues the mistaken assumption that in this case and as against these petitioners he has two separate causes of action for relief, the one arising independently under the Constitution of the United States and another arising out of the Civil Rights Act for an alleged violation of his constitutional rights. Article 1, section 10, clause 1 of the Constitution of the United States is a prohibition against the states, and not against individuals and corporations such as the Gulf respondents. The fourteenth amendment to the Constitution also protects individuals against "state action." As to the Gulf respondents an assertion that they violated his rights guaranteed by the "contract clause" is "an allegation of fact which is impossible in law."[2]

Absent the Civil Rights Act McGuire alleged no cause of action here for which damages is available as a remedy, and this action the courts below properly held to be barred. No alternative common law tort action was claimed. Moreover, there being no diversity of citizenship, either actual or alleged, there would have been no jurisdiction of the federal court in this case in a tort action.

Neither do the decisions below, in the proper context of this case, conflict with the decisions of this court or of other courts of appeals as contended by petitioner at page 9. Pe-

[2] United Transport Service Employees of America, CIO, ex rel. Washington v. National Mediation Board, 179 F.2d 466 (D.C. Cir. 1949).

titioner fails to explain how his right to recover and these respondents' liability to him could be created by land patents from the State of Texas to McGuire's predecessors in title. There is no rational nexus, and the cases which petitioner cites at page 10[3] are both inapplicable to the instant case and generally appear to have been misconstrued. At issue in all of those cases was the effect of state legislation upon vested property rights, and not the claims which petitioner has asserted here.

B. There is No Conflict with the Decision Below On the Applicable Limitations Statute or Limitation Period.

In his second point, at page 11, petitioner argues that the decisions below conflict with a prior decision of this Court and a decision of the Court of Claims in failing to hold that he could wait "until the end of the four year taking, irrespective of limitation laws, before filing suit for compensation and damages." Under this argument petitioner refers to his claims for decline in value of his land and for legal and surveying expenses which were performed in 1965 and 1966.

The decision of this Court cited by petitioner is *U. S. v. Dickinson*, 331 U.S. 745 (1947), an inverse condemnation case brought to recover compensation for the value of plaintiff's land inundated by water impounded by a federally owned dam. The facts are unique and since the instant case involves no question of eminent domain, it is wholly inapposite.

[3] Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1816); Fletcher v. Peck, 6 Cranch 87 (1809); Wood v. Lovett, 313 U.S. 362 (1941); Anderson-Tully Co. v. Murphree, 153 F.2d 875 (8th Cir. 1946).

In *Terteling v. U. S.*, 334 F. 2d 250 (Ct. Cl. 1964) also cited by petitioner, plaintiff brought an action to recover costs and expenses incurred in defending certain lawsuits. His claim was based upon breach of an express term of a contract with a government agency that it would furnish gravel pit sites without cost. The litigation expenses for which plaintiff sought to recover arose from a dispute with claimants to the gravel pit sites. The issue of limitation was determined by applying the federal statute providing six-year limitation periods for actions in the Court of Claims. This holding was based upon the applicable federal statute of limitation and is not applicable to the instant situation which is clearly governed by state limitation law.[1]

Despite the uniformity of Texas decisions upon the point, petitioner also tenders an argument at page 13 that the decision of the lower court is "in conflict with applicable state law as to which statute of limitation applies." As pointed out by the courts below, in Texas an action for liability created by statute is considered an action for debt not evidenced by a contract in writing and is governed by the two-year statute of limitation. Tex. Rev. Civ. Stat. Ann. art. 5526 (1958). (Petition Appendix, pages A-5, A-6, A-14 and A-15)

Beginning at page 13, petitioner argues that the ten-year statute, Tex. Rev. Civ. Stat. Ann. art. 5510 (1958), applies to this case. As shown on page 3 of the petition, this statute has application to the recovery of lands and not to suits for damages thereto as is here involved; and *Brazos River Authority v. City of Graham*, 163 Tex. 167, 354 S.W. 2d 99 (Tex.

[1] Beard v. Stephens, 372 F.2d 685 (5th Cir. 1967) and cases cited by the court below. (Petition Appendix, page A-14)

1961), cited by petitioner is equally inapplicable. There plaintiff brought suit against a river authority for the flooding of its property as a result of a dam maintained by the river authority. The court held that taking occurred when the operation of the dam commenced and that the land limitation statute, rather than the general four-year statute, applied. Since that case involved an inverse condemnation proceeding, it can have no logical application to the litigation at hand, particularly as to Gulf.

Under point three, petitioner also argues that his cause of action is one founded upon a contract in writing and thus governed by the four-year statute of limitation governing actions on written contracts, Tex. Rev. Civ. Stat. Ann. art. 5527 (1958). This argument is based upon the reasoning that the patent to McGuire's predecessors was a contract in writing and that the State of Texas breached this contract by selling the land. Petitioner does not now and has never alleged or argued that a written contract existed between himself and Gulf. Therefore, his argument concerning the statute of limitation applicable to actions based upon written contracts is also inapplicable to this respondent.

Petitioner again argues that his two suits were in effect one — for equitable relief. As succinctly stated by the court of appeals, the fact that one of the remedies sought is equitable does not constitute the cause of action one in equity, and petitioner's effort to avoid the effect of the statute of limitation and his refusal to seek this relief in the Austin case by asking for equitable relief is ill-founded as the court of appeals perceived.

Nor can petitioner's argument concerning a constructive trust have any application to Gulf in that petitioner has neither alleged nor argued that Gulf has ever received any funds from any person throughout the pleadings and briefs he has filed in this and the earlier suit. In his complaint his prayer for impression of a constructive trust applied only to moneys received by M. D. Bryant. The imposition of a constructive trust as to these respondents is not possible.

In his point four, petitioner cites *O'Sullivan v. Felix*, 233 U.S. 319 (1914) to support his contention that the decision below conflicts with that decision of this Court in failing to apply the same limitation statute as would be applicable to a similar action which is not a civil rights violation. In that case, where plaintiff brought an action for damages for assault, it was held that the five-year federal statute of limitation did not apply and that the application of a state statute of limitation is not precluded because the action depends or arises under the laws of the United States. The decision, in its proper context, was relied upon by both courts below. Moreover, as to the point attempted to be made by petitioner, the trial court clearly demonstrated that the two-year statute would apply here even if McGuire's action were considered as a suit for fraudulent conspiracy, for damages based upon fraud, or for injury to real property. (Petition Appendix, pages A-6, A-7)

C. The Courts Below Properly Decided This Action.

There is no miscarriage of justice in the decision of the court below, as contended by petitioner. His statements show that he was offered and refused a substantial sum

of money for an oil and gas lease, just as was paid for leases on the land declared to be vacant and on other land where the dry hole was drilled. Now a substantial windfall has not materialized.

Rather than hold that McGuire has not had a trial of his conspiracy complaint, the trial court in Austin on remand in that case prefaced the remarks partially quoted by McGuire on page 19 of his petition by the finding that

> "* * * the evidence adduced in this case as a result of extensive discovery proceedings fails to indicate any probability of proof of a conspiracy on the part of any of the defendants and none is reported in the findings of the Special Master," (Petition Appendix, page A-26)

Petitioner's posture in these proceedings was correctly characterized by the trial court in the last paragraph of his opinion. (Petition Appendix, pages A-8, A-9) McGuire has had his day in court on this matter — many of them. While he represents himself here, he is no stranger to the courtroom;[5] nor is he a stranger to conspiracy actions under the Civil Rights Act.[6] He had adequate opportunity to present his claims in his prior suit in the Austin court, and has shown no tenable basis for being permitted to avoid settled law and to continue piecemealing his litigation.

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[5] See McGuire v. Bond, 271 S.W.2d 508 (Tex. Civ. App. 1954, writ ref'd n.r.e.); City of Dallas v. McGuire, 159 S.W.2d 958 (Tex. Civ. App. 1942), rev'd, 170 S.W.2d 722 (Tex. 1943); McGuire v. City of Dallas, 151 S.W.2d 617 (Tex. Civ. App. 1941, writ dismissed).

[6] See McGuire v. Todd, 198 F.2d 60 (5th Cir. 1952), cert. denied, 344 U. S. 835 (1952).

CONCLUSION

Petitioner has shown no special and important reasons which would merit this court's granting a writ of certiorari. (U. S. Sup. Ct. Rule 19, 28 U. S. C.A.) Respondent respectfully submits that a writ of certiorari should not be granted.

Respectfully submitted,

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By _____
John E. Thomason
Attorneys for Respondents,
Gulf Oil Corporation,
R. E. Griffith and
Frank R. Bass.

CERTIFICATE OF SERVICE

I certify that a copy of this Brief in Opposition has been mailed to Petitioner and to all counsel of record.

_____
John E. Thomason
Of Counsel for Respondents

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In The

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 1608

L. L. McGUIRE,

Petitioner,

v.

JOHN F. BAKER, et al,

Respondents.

Brief of Respondents, John F. Baker, Bryant Williams, Independent Executor of the Estate of M. D. Bryant, Deceased, and Trustee of the Bryant Family Trust; and Mrs. Ethel C. Bryant in Opposition to Petition for Writ of Certiorari

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

Reference to the opinions of the District Court and Court of Appeals is adequately made in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether Petitioner's cause of action was barred by Article 5526, Vernon's Annotated Texas Statutes (the Texas Two-Year Statute of Limitations) as held by the District Court and affirmed by the Court of Appeals.

STATEMENT OF THE CASE

The facts of the cases are stated fully in the opinions of the District Court (Petitioner's Appendix A-1 to A-9) and the Court of Appeals (Petitioner's Appendix A-10 to A-13).

In order to set forth in more detail some of the pertinent facts indicating the extent of Petitioner's knowledge and understanding of his possible cause of action, the length of time he had such knowledge and understanding and the fact that any delay in filing suit was for Petitioner's convenience, we take the liberty of making the following additions to the statements of the District Court and Court of Appeals referred to above.

As has been stated in said opinions, Petitioner brought a first suit involving this entire transaction in the United States District Court for the Western District of Texas, Austin Division, which was Cause No. 1313, styled L. L. McGuire v. Jerry Sadler, et al, and this suit will be referred to herein as the "Austin Case".

In paragraphs 18 through 21 of his First Amended Complaint dated December 22, 1962, in the Austin Case, Petitioner alleges a conspiracy on the part of Bryant and the other Respondents herein, including Gulf Oil Corporation

and its employees, although not parties thereto, to deprive him of his lands; to build spurious monuments; to move survey lines; and to make fraudulent surveys (Court of Appeals Appendix, p. 53). In almost identical language, in paragraphs 13 through 15 of his First Amended Complaint filed herein, Petitioner alleges the same conspiracy against the same persons, the Respondents herein. (Unprinted Record, Petitioner's First Amended Complaint, pp. 6-7)

In paragraph 24 of his First Amended Complaint in the Austin Case, Petitioner alleged he knew of the dishonest survey on December 16, 1961. (Court of Appeals Appendix p. 24) The same allegation appears in paragraph 19 of Petitioner's First Amended Complaint herein (Unprinted Record, Petitioner's First Amended Complaint p. 9).

Again, paragraphs 30 and 31 of Petitioner's First Amended Complaint in the Austin Case (Court of Appeals Appendix p. 30) and paragraphs 25 and 26 of his First Amended Complaint herein (Court of Appeals Appendix p. 10) almost identically allege that the reports of Surveyor Thompson and the plats were dishonest and fraudulent and that the monuments used by him were built by Respondents, Bryant, Baker and Gulf Oil Corporation.

And again in paragraphs 55 through 59 of his First Amended Complaint in the Austin Case, Petitioner alleged the conspiracy among all Appellees to fraudulently and dishonestly deprive him of his lands (Court of Appeals Appendix pp. 65-66).

At the hearing on Respondents' various motions to dismiss and for summary judgment, in response to the District Court's inquiry as to why he did not include his claim for damages in the Austin Case, Petitioner made the following judicial admission, to-wit:

> "Your Honor, that brings up the awfully involved question of when this cause of action accrued. When the Plaintiff filed this suit in Austin, I think it was October 1, 1962, the land had not been patented to Mr. Bryant. That suit was a suit for an injunction to prevent him from selling the land. Well, now, the Court did not dismiss that suit in Austin until June 19, 1963, about nine month later. Then several days later, Mr. Sadler sold the land to Mr. Bryant. *Then the Plaintiff could not sue for damages accrued. But the Plaintiff could not sue for damages until the damage was done: The damage was — the Plaintiff knew as early as October of '61 — I mean December of '61, that they were making a dishonest survey out there. The plaintiff did not know the land of the plaintiff would be taken until it was.* The Land Commissioner held up on awarding the land and selling it to Mr. Bryant until the district court in Austin in 1963 dismissed the plaintiff's case. If the case had been tried, there is a good possibility the Land Commissioner would not have, and I think he would have never sold it to Mr. Bryant, but as soon as the district court dismissed the case, I guess he felt the plaintiff wouldn't go on with it and he was mistaken." (Court of Appeals App. p. 98) (emphasis ours).

Judge Brewster, a little later, again inquired as to why Petitioner didn't sue for damages in the earlier Austin suit and the following exchange took place:

> THE COURT: "You knew you could have brought them in and made them parties to that suit and you could have asked for damages if you had wanted to?"

MR. McGUIRE: "Well, I hadn't — I could have asked but I just didn't feel —"

THE COURT: " — You didn't think it was the judicious thing to do?"

MR. McGUIRE: "Well, how would I know that the Court would hold with me? In fact, there was a good chance that this case — that I would have lost the case down there and I didn't feel that the — the case was all very, very complicated and I didn't want to make it any worse at that time until I knew that the court would decide that the patents to Mr. Bryant should be cancelled." (Court of Appeals Appendix p. 99).

The essence of Petitioner's cause of action, as stated in paragraphs 1 and 2 of his First Amended Complaint herein is a suit for monetary damages under the Civil Rights Act, 42 USCA Sections 1983 and 1985 (2), (3). Article 1, Section 10 and the 14th Amendment to the U. S. Constitution (Court of Appeals Appendix pp. 2 & 3); and Petitioner made demand for a jury (Court of Appeals Appendix p. 17).

There is no diversity of citizenship, and of necessity to Federal jurisdiction, Petitioner must base his claim upon his alleged violation of Federal rights giving rise to a Federal question.

ARGUMENT

1. The Courts Below Were Consistent with the Decisions of This Court and the Circuits in Borrowing and Applying Texas Limitations Statutes.

It is axiomatic that when, as here, Congress has provided no period of limitation for the enforcement of a federal claim or right, the Federal Courts must borrow the applicable limitations statute from the state in which it sits. *O'Sullivan v. Felix*, 233 U.S. 318, 58 L. Ed. 98 (1918);

Beard v. Stephens, 372 F. 2d 685 (5th Cir. 1967); *Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F. 2d 80 (2nd Cir. 1961), cert. den. 368 U.S. 821, 7 L. Ed. 2d 26. In this borrowing process, the Federal Court must, first, determine the essential nature of the claim from the available Federal law; secondly, it must look to, and follow, the state law in determining which state statute of limitation is applicable to claims having that same nature. *McClaine v. Rankin*, 197 U.S. 154, 49 L. Ed. 702 (1905); *Beard v. Stephens*, supra; *Moviecolor Ltd. v. Eastman Kodak Co.*, supra; *Smith v. Cremins*, 308 F. 2d 187 (9th Cir. 1962); 98 ALR 2d 1160, at 1162-1165.

There being no federal statute of limitation applicable to suits under the Civil Rights Act many of the circuit courts have held that the statutes of limitations of the states within which the federal courts are sitting are applicable to suits for damages based on violation of the particular sections of Civil Rights Act involved here. *Beard v. Stephens*, supra, (5th Cir. 1967); *Hileman v. Knable*, 391 F. 2d 596 (3rd Cir. 1968); *Swan v. Board of Higher Education*, 319 F. 2d 56 (2nd Cir. 1962); *Mohler v. Miller*, 235 F. 2d 153, (6th Cir. 1956); *Smith v. Cremins*, supra, (9th Cir. 1962); *Jackson v. Duke*, 259 F. 2d 3, (5th Cir. 1958); also, cases cited in 90 ALR 2d 265 and 98 ALR 2d 1160. No court of appeals has held to the contrary.

2. Holding of the Courts Below as to Nature of This Suit Does Not Conflict.

The District Court and Court of Appeals holding that the nature of Petitioner's suit is either (a) a suit for dam-

ages based on liability created by statute, to-wit, the Civil Rights Act, 42 USC § 1983 and 42 USC § 1985, or (b) a suit for damages to an interest in real estate does not conflict with any decision of this Court or of any of the circuit courts and is proper.

Almost invariably federal courts have determined that suits for damages under the Civil Rights Act are in the nature of suits based on "liability created by statute" where such a provision is included in the limitation laws of the states in which they sit. *Lamber v. Conrad*, 308 F. 2d 571 (9th Cir. 1962); *Smith v. Cremins*, supra; *Swan v. Board of Higher Education*, supra, *Fischman v. Raytheon Mfg. Co.*, 188 F. 2d 783 (2nd Cir. 1951); *Suckow Borax Mines Consol., Inc. v. Borax Consol. Ltd.*, 185 F. 2d 196 (9th Cir. 1950); *Bomar v. Keyes*, 162 F. 2d 136 (2nd Cir. 1947); *Culver v. Bell & Loffland, Inc.* 146 F. 2d 29 (9th Cir. 1944); *Donald v. Bird*, 85 F. 2d 663 (9th Cir. 1936); See also, cases cited in 98 ALR 2d 1160;

Petitioner says his is a suit arising under Article 1, Sec. 10 and the 14th Amendment of the Constitution, or that he would have an action at common law regardless of the Civil Rights Act, and that therefore his action is not based on liability created by statute. See Petition p. 11.

However, the precise purpose of the Civil Rights Act was to provide a remedy in damages for violation of the federal Constitution and laws and without the Civil Rights Act he would have no such federal remedy. The fact that the suit arises under the Constitution does not change the fact that it is a suit for damages under the Civil Rights Act for viola-

tion of a right or immunity under the Constitution a federal law. As a matter of fact, a brief look at the cases reveal that most all of the suits for relief under the Civil Rights Act are based on violation of the "due process" and "equal protection" clauses of the 14th Amendment.

Also, there being no diversity of citizenship here, the jurisdiction of the Federal Court is based solely on allegations of a cause of action under the Civil Rights Act, 42 USC §§ 1983 and 1985. If Petitioner's only remedy was in damages under some common law theory, without involving a violation of the Civil Rights Act, the Federal Court would have no jurisdiction.

Petitioner at page 11 of his petition cites *Smith v. Cremins*, supra, for the proposition that since he may have had a cause of action at common law which would exist in the absence of the Civil Rights Act, his action is not based on "liability created by statute." He relies on a statement of the Court as follows, "an action is not based 'upon a liability created by statute' if the right is one which would exist at common law in the absence of statute," 308 F. 2d at p. 189. However, this quote is only a portion of a sentence in which the Court was quoting California law and is cited out of context. Actually, *Smith v. Cremins* held that a suit under the Civil Rights Act can not be an action which would exist at common law in absence of statute but must be in the nature of a suit based on "liability created by statute."

In so holding the Ninth Circuit explained that this as well as other suits brought under the Civil Rights Act must be considered suits based on "liability created by statute," as follows:

> "The California courts have held that an action is based "upon a liability created by statute," within the meaning of Section 338(1), if the liability would not exist but for statute. Or, conversely, an action is not based "upon a liability created by statute" if the right is one which would exist at common law in the absence of statute. Though broadly stated, the distinction drawn is sufficiently discriminating for the present case.
>
> "Section 1983 of the Civil Rights Act clearly creates rights and imposes obligations different from any which would exist at common law in the absence of statute. A given state of facts may of course give rise to a cause of action in common-law tort as well as to a cause of action under Section 1983, but the elements of the two are not the same. The elements of an action under Section 1983 are (1) the denial under color of state law (2) of a right secured by the Constitution and laws of the United States. Neither of these elements would be required to make out a cause of action in common-law tort; both might be present without creating common-law tort liability." 308 F. 2d at 189-190.

The Court in *Smith v. Cremins*, added the following sound reason for holding that suits for damages under the Civil Rights Act are suits based on "liability created by statute." This reason is that in fact the cause of action is a statutory cause of action created by Congress in the Civil Rights Act. Inconsistency and confusion would result if the single cause of action created by Congress were fragmented in accordance with analogies drawn to rights created by state law,

and the several differing periods of limitation applicable to each state created right were applied to the single federal cause of action.

Decisions of federal courts sitting in states which have no such expressed provision in their limitation statutes for suits based on "liability created by statute" nevertheless consistently classify the nature of suits brought under the Civil Rights Act as suits based on "liability created by statute," and then look to the state case law to see which provision of the state limitation laws is applicable to a suit of such nature. See *Mohler v. Miller*, supra; *Wakat v. Harlib*, 253 F. 2d 59 (7th Cir. 1958).

Again Petitioner states at page 18 of his petition that the holding of the courts below conflicts with *Wakat v. Harlib*. Petitioner says that in *Wakat* the Seventh Circuit held that since there was no expressed "liability created by statute" provision in the Illinois limitation law, the court would apply the limitation law provision applicable to "every action for which no limitation is otherwise provided." This is not a correct statement of that decision. That decision held that the suit for damages under the Civil Rights Act was a suit based on "liability created by statute." Then the Court reviewed and expressly relied on Illinois' decisions in determining which provision of the limitation law to apply. This is exactly what the District Court and the Fifth Circuit did here. They determined this suit to be in the nature of a suit based on "liability created by

statute," then looked to and followed Texas court decisions holding suits of such are governed by the two year statute of limitations applicable.

Consistency and uniformity result when the nature of the causes of action under the Civil Rights Act are standardized as suits based on "liability created by statute." In fact, as stated above, almost invariably federal courts find this to be the nature of such suits. The holding of the courts below is consistent with those decisions.

Alternatively, the courts below held that Petitioners suit is in the nature of a suit for damages for trespass on or injury to land or an interest therein. Petitioner by use of semantics, attempts to make his suit one for "taking" not "damage" or "injury" to land and says his claims is like that of claimants in *U. S. v. Dickinson*, 331 U.S. 745, 91 L. Ed. 1789 (1947) and a Texas case, *Brazos River Authority v. City of Graham*, 163 Tex. 167, 354 S.W. 2d 99 (1961). Those cases are not of the same nature as the case at bar; they are condemnation suits, direct or inversely, for compensation for land lawfully taken by a legally empowered sovereign authority. It is elementary that in condemnation cases there is a lawful permanent appropriation of an interest in property for a public use, and after compensation for such is paid the claimant, the authority taking same becomes and remains the owner of the interest in property appropriated by it.

On the other hand in this case, any entry on, use of or taking of benefits from the land was not a taking, but

was a consequence of Bryant's trespass thereon which was terminated by Petitioner in his first suit; there is no appropriation for a public use; none of the Respondents had any sovereign capacity or authority on which to base an appropriation for a public use, as none of the Respondents have such condemnation powers (not even Respondent Sadler, in his capacity and where not for public use); and, none of the Respondents obtained any permanent interest in any property for which Petitioner is entitled to compensation because a property interest was "taken" from him. No, Petitioners' suit is in the nature of a suit for redress for consequential damages to real estate resulting from the acts of a trespasser as the courts below correctly so found. See, *Humble Oil & Refining Co. v. Kishi*, 276 S.W. 190 (Texas 1927); *Gulf Refining Co. v. Mabey*, 134 S.W. 2d 843 (Tex. Civ. App. 1940); *Gulf Oil Corp. v. Alexander*, 291 S.W. 2d 792, 295 S.W. 2d 90 (Tex. Civ. App. 1956, error ref'd n.r.e.); and *Kirby v. Hayden*, 125 S.W. 993 (Tex. Civ. App. 1910).

3. Holding of Courts Below that the Texas Two Year Limitation Statute is applicable to Bar Petitioner's Action Does not Conflict.

Under *O'Sullivan v. Felix*, supra, *Board v. Stevens*, supra, *Moviecolor Ltd. v. Eastman Kodak Co.*, supra, and *Smith v. Cremins*, once the District Court (and the Court of Appeals or review) determined the nature of Petitioners suit, it was bound to, and did, look to and follow the state law in determining which provision of the state limitation law applied to suits of such nature. The courts below were following *O'Sullivan* not holding in conflict therewith as Petitioner says.

Under Texas law the Texas two year Statute of Limitation is applicable to suits based on "liability created by statute" or suits for damages or injury to land or an interest therein.

Article 5526, VATS prescribes a two-year limitation period on the following types of actions:

(1) "Actions of trespass for injury done to the estate or property of another." Article 5526 VATS, Section 1.

(2) "Actions for debt where the indebtedness is not evidenced by a contract in writing." Article 5526 VATS, Section 4.

Although the Texas limitation statute has no express provision applicable to suits based on "liability created by statute, nevertheless, it is well established by numerous state and federal decisions that a suit based on "liability created by statute" is an action for debt not evidenced by a contract in writing and is governed by the Section 4 of the two year statute. *Rose v. First State Bank*, 59 S.W. 2d 810 (Tex. 1953); *Cowart v. Russell*, 144 S.W. 2d 249 (Tex. 1940); *Payne v. Tyler*, 379 S.W. 2d 373 (Tex. Civ. App. 1964, writ ref'd., n.r.e.); *Shaw v. Burk*, 61 S.W. 2d 526 (Tex. Civ. App. 1933, writ ref'd.); *Hollingsworth v. Cities Service Oil Co.*, 199 S.W. 2d 266 (Tex. Civ. App. 1947, writ ref'd.), cert. denied 322 U.S. 744; *Port Arthur v. Tillman*, 382 S.W. 2d 138 (Tex. Civ. App. 1966) reversed on other grounds, 398 S.W. 2d 750 (Tex. 1965); *Uhler v. Todd Houston Ship Building Corp*, 198 2d 631 (Tex. Civ. App. 1946, no writ

history). See *Hamilton v. Board of Fireman's Relief and Retirement Fund Trustees*, 408 S.W. 2d 781 (Tex. Civ. App. 1966, n.r.e.)

If it is considered that Petitioners cause has some quasi-common-law basis, it still is considered to be one for debt or on account and barred by the two year statute. *Ferguson v. Ferguson*, 181 S.W. 2d 601 (Tex. Civ. App. 1944, writ ref. w.o.m.); *Zarnba v. Boethel*, 393 S.W. 2d 716 (Tex. Civ. App. 1965); *Clanton v. Community Finance & Thrift Corp.*, 262 S.W. 2d 252 (Tex. Civ, App. 1953).

In *Russell v. Starkeys*, 286 F. 2d 786 (5th Cir. 1961), the Fifth Circuit has construed said Section 4 of Article 5526 very broadly to cover all types of claims giving rise to an obligation to repay, whether such obligation be express or implied.

We are able to find only one case in which a federal court was considering the applicability of the Texas limitation statute to a suit under the Civil Rights Act and that was *Jackson v. Duke*, supra. In that case the Fifth Circuit held that the sections of the two year statute Article 5526 VATS dealing with suits for conversion of personal property and suits for personal injuries applied to a suit under the Civil Rights Act for damages from assault by a police officer. No cases were cited and the possible applicability of some other limitation statute was not discussed.

However, in analagous situations involving suits under similar federal statutes providing for recovery of money damages, the federal courts in Texas have constructed such

actions to be causes of action upon a "debt" and upon statutory liability, governed by the two year statute of limitation. *Green v. Wilkinson*, 135 F. Supp. 309 (ND Tex. 1955) aff'd 234 F. 2d 120 (5th Cir. 1956) (a suit for damages under Federal Anti-Trust law). *Klotz v. Ippolito*, 40 F. Supp. 422 (SD Tex. 1941) (suit in FLSA); *Owen v. Liquid Carbonic Corp.*, 42 F. Supp. 744 (SD Tex. 1941); *Duncan v. Montgomery Ward & Co., Inc.*, 42 F. Supp. 879 (SD Tex. 1941); *Hollingsworth v. Cities Service Oil Co.*, supra.

It is evident that the Texas courts have determined that Section 4 of the Limitation Statute are applicable to suits based on "liability created by statute" and that the federal courts have so found that to be the Texas law.

The courts have uniformly held that actions for damages or injuries to real estate are governed by Section 1 of the same two year statute. See, *Tennessee Gas Transmission Co. v. Fromme*, 269 S.W. 2d 336 (Tex. 1954); *Gulf Oil Corp. v. Alexander*, 291 S.W. 2d 792 (Tex. Civ. App. 1956, writ ref'd, n.r.e.); *Gulf Oil Corp. v. Nabers*, 134 S.W. 2d 843 (Tex. Civ. App. 1939 n.w.h.); *Tietze v. International & G. N. R. Co.*, 80 S.W. 124 (Tex. Civ. App. 1904).

4. Holding of Courts Below That Petitioner's Cause Accrued June 24, 1963, Was Correct and Does Not Confliet.

Under Article 5526 VATS, the limitation period begins to run on the date a cause of action "accrued." The Courts below held Petitioners cause accrued on June 24, 1963, the date the state sold the land claimed by Petitioner and issued patents thereto to Respondent Bryant.

The oft stated rule applicable in determining when a cause of action accrues in the absence of fraudulent concealment is stated by the Supreme Court of Texas as follows:

> "When an act is in itself lawful as to the person who bases an action on injuries subsequently accruing from, and consequent upon, the act, it is held that the cause of action does not accrue until the injury is substained, * * * If, however, the act of which the injury was the natural sequence was a legal injury, — by which is meant an injury giving cause of action by reason of its being an invasion of a plaintiff's right, — then, be the damage however light, limitation will run from the time the wrongful act was committed, and will bar an action for any damages resulting from the act, although these may not have been fully developed until within a period less than necessary to complete the bar." *Houston Waterworks v. Kennedy*, S.W. 36, at p. 37 (Tex. 1888).

This is the general rule. *Lyles v. Railway Co.*, 11 S.W. 782 (Tex. 1889); *Tennessee Gas Transmission Co. v. Fromme*, supra; See also, 54 C.J.S. Limitation of Actions Section 168 pp. 122-123.

Where both the fraud and the persons committing the fraud are known, or should have been known in the exercise of due diligence, this general rule applies, and a person cannot withhold suit merely for want of knowledge of or lack of ability to ascertain the full extent of the damages, Nor will the fact that actual or substantial damages do not occur until a later date postpone the running of the limitation period. *Burnham v. Todd*, 139 F. 2d 388 (5th Cir. 1944); *Atkins v. Crosland*, 417 S.W. 2d 150 (Tex. 1967);

Guinn v. Press, 140 S.W. 2d 438 (Tex. 1940); *Daniels v. Conrad*, 33 S.W. 2d 411 (Tex. Civ. App. 1959 writ ref'd, n.r.e.); *Gulf Refining Co. v. Nabers, supra, Collins v. Griffith*, 125 S.W. 2d 419 (Tex. Civ. App. 1938, error ref'd); *American Indemnity Co. v. Ernest & Ernest*, 106 S.W. 2d 763 (Tex. Civ. App. 1937, error ref'd); 54 C.J.S. Limitations of Actions Section 168, p. 123; 37 Tex. Jur. 2d Limitations of Actions Section 63, p. 184.

These cases and the Courts below are consistent with *Holmberg v. Armbrecht*, 327 U.S. 392 90 L. Ed. 743 (1946); *Moviecolor Ltd. v. Eastman Kodak Co.*, supra, and other cases applying the "federal fraudulant concealment doctrine," See 90 ALR 2d 265, at 275. The holding of the Courts below that Petitioner cannot find relief in said doctrine is consistent with such decisions because at the date they determined his cause of action accrued there was no concealment; Petitioner already had full knowledge of his cause of action, all the parties to the wrongful conspiracy as well as every element of conspiracy.

For the sake of brevity we ask the Court to refer to the statement of the case section of this brief, and to consider and to compare the different paragraphs of Petitioner's pleadings in the Austin case with the designated paragraphs in the present suit showing to the fullest extent that Petitioner had knowledge as early as December 1962 and probably December 1961, of his cause of action for damages, the conspiracy, all the alleged fraudulent acts, dishonest surveying, map making and monument moving and the identity of

all the alleged conspirators committing acts of fraud. Petitioner admitted to the District Court in this case that he knew he had a cause of action for damages as early as December 1962 and probably December 1961. (Court of Appeals App. pp. 98-99). Petitioner stated to the court, "Well, now, the court did not dismiss that suit in Austin until June 1, 1963, about nine months later. Then several days later (June 24, 1963) Mr. Sadler sold the land to Mr. Bryant. *Then the plaintiff's cause of action for damages accrued.*" (Court of Appeals App. p. 98) (emphasis ours).

5. Holdings of Courts Below Do Not Conflict with Any Case cited by Petitioner.

Petitioner claims the holding of the lower courts herein conflicts with *Trustees of Dartworth College v. Woodward*, 17 U.S. 518, 4 L. Ed. 629 (1819); *Fletcher v. Peck*, 3 L. Ed. 162 (1810); *Wood v. Lovett*, 313 U.S. 362, 85 L. Ed. 1404 (1941). *Anderson-Tully Co. v. Murphree*, 153 F. 2d 874 (8th Cir. 1946); *McGuire v. Sadler*, 337 F. 2d 902 (5th Cir. 1964). We fail to see any relationship of the issues determined in those cases to the issues in this suit. In those cases the respective courts were addressing themselves to the issue whether some state action was an impairment of private contract. There is no discussion or authoritative statement contained in any of them on the issue as to the nature of a cause of action or as to which limitation statute to apply. Any issue as to whether or not the patents issued by the State of Texas impaired any private contract of Petitioner has long been resolved in the first Austin suit, when

Respondent Bryant filed disclaimers to the lands included in his patents and the other respondents allowed judgment cancelling the patents to be entered. Thereafter, there can be no issue of any state action impairing Petitioner's contract, if in fact the patents ever did.

Petitioner at page 13 of his petition says that a different panel of the Fifth Circuit "*on the same allegations*" said in *McGuire v. Sadler* that a possible claim of impairment of contract might have been involved. Again this is not a correct statement, for the allegations in that suit stated that patents were wrongly issued to Respondent Bryant and asked for cancellation of those patents and recovery of the land. In this suit the patents have already been cancelled and the land recovered, and the remedy asked for is money damages.

Petitioner cites *Peek v. Berry*, 184 S.W. 2d 272 (Tex. 1944), in support of his contention that his suit is actually in equity and the four year limitation should apply. Unlike the case at bar, *Peek* is a case involving a suit for imposition of a constructive trust on property, recovery of the property and for recovery of damages to that trust property, and the court held that the claim for damages to the trust property being incidental to the claim for establishing the trust was includable in the suit even though the claim for damages would have been barred by the two year statute if in a separate suit.

In this case the property was regained in a prior suit and this claim for damages is not incidental to a suit the nature of which commands the application of a longer limitation

period. The recovery of the lands damaged and the cancellation of the instruments had already been accomplished. There is no claim for cancellation of any, patents and recovery of property to which Petitioner's claim for damages is incidental. Nor is there a situation giving rise to a constructive trust to which Petitioner's claim for damages is incidental. To the contrary, Petitioner expressly pleads that he is asking for impression of a trust or damages to the land, one or the other, not both, rather than asking for damages incidental to his claim for impression of a trust (Court of Appeals App. p. 15).

As a matter of law, no constructive trust can be imposed. There are several basic elements lacking.

First, there is no res. Petitioner successfully disputed Respondent Bryant's title to the vacancy lands, Bryant's right to lease, and Gulf's rights under the lease. Thus, by his own Austin suit, Petitioner established that Gulf got nothing by its lease. Had Bryant the legal authority, by agency or some other relationship, to give a lease of Petitioner's interest and had done so but did not in turn pay the consideration over to McGuire, then there would have been a situation to impress a trust on the consideration because a valid existing lease would have been obtained of his interest for which he would have been entitled to the consideration. But that is not the case here, and Petitioner, cannot, consistent with the principles governing the impression of a constructive trust, deny the existence of the lease and Gulf's rights under it and at the same time sue for and claim the consideration therefore.

Respondent Bryant did not by mistake, fraud or otherwise, receive anything from Gulf the legal title to which was theretofore owned by Petitioner, thus giving rise to the holding of such legal title by Bryant for the benefit of Petitioner. To the contrary Bryant received the lease bonus from Gulf in exchange for his execution of a lease covering his interest, whatever it might be, in certain lands (only a portion of which are involved in this dispute) on the basis of a privately negotiated lease contract. Respondent Bryant did not receive money either by mistake or deception that was intended by Gulf for Petitioner or to which he had a claim. Gulf likewise tried to negotiate a lease with Petitioner, at least to the extent that he had any semblance of title. (Court of Appeal App. pp 12 and 44).

Petitioner had no claim of ownership, equitable or legal, to the bonus Gulf was willing to pay to Respondent Bryant for a lease of his interest or claim in the lands. There was no fiduciary relationship between Bryant, or Gulf, and Petitioner, nor was there any fraud or deception involved on the part of induced Gulf to deliver to Bryant something that was owned by Petitioner. See 54 Tex. Jur. 2d 422-478, Trusts, Sections 54 et seq.

Assuming for the moment that some portion of Petitioner's claim sounds in equity, any such equitable remedy would be concurrent with, not incident to his legal claims Petitioner expressly so pleads in his amended complaint herein. (Court of Appeals App. 15). The decision of the courts below are consistant with a long line of authorities that, if

a suit is in equity the limitations statutes are controlling if equity has jurisdiction concurrent with jurisdiction to enforce a legal obligation. *Cope v. Anderson,* 331 U.S. 461, 91 L. Ed. 1607 (1947); *Godden v. Kimmell,* 99 U.S. 201, 25 L. Ed. 431 (1879); *Swan v. Board of Higher Education,* supra. Even if the suit were held to be governed by laches the Court may and usually do apply the periods prescribed by the limitation statutes. *Wagner v. Baird,* 12 L. Ed. 681 (1849). *Sullivan v. Portland & KR Co.,* 94 U.S. 806 24 L. Ed. 324 (1877) *McClaine v. Rankin,* supra, *Leonick v. Jones Laughlin Steel Corp.,* 258 F. 2d 48 (2nd Cir. 1958). See also, *Gardner v. Panama Railroad Co.,* 342 U.S. 30, 96 L. Ed. 36 (1951).

6. The Matters Involved Here Are Not of Such Importance That the Holding of the Lower Courts Should Be Reviewed.

The crux of the issues involved in this suit is the determination of the nature of the suit. As indicated above, almost every Court of Appeals has determined that a suit under the Civil Rights Act is in the nature of a suit based on "liability created by statute" as was determined in this suit. There already is uniformity on this point.

Further, the determination of the nature of a suit is a somewhat elementary judicial determination involved in every suit filed. It is reviewable as a matter of right by the circuit court. We believe that such a preliminary and elementary decision of the district court is not of such importance that the Supreme Court should occupy its time allowing every litigant a review of this determination.

Lastly, this suit in essence originated as a Texas vacancy land suit. The issues and problems involved will seldom, if ever, be presented in the federal courts again and therefore we feel this suit is not of such importance as requires review by this Court.

7. Holdings of Lower Courts Not Gross Injustice.

Petitioner being a layman representing himself, the courts in the two suits spread over seven years have been fair to him to the fullest extent of the law.

Under Rule 43 (a) Federal Rules of Civil Procedure, this Court can take judicial notice of the proceedings in the Austin suit. 2B Barron and Holtzoff, Federal Practice and Procedure 230, Section 963. In said suit Petitioner spent almost the entire six weeks testifying himself. He proffered no testimony other than his own. In need of expert evidence to rebut evidence offered by Respondent, he was allowed to qualify himself as expert and to give expert testimony with respect to surveying, petroleum engineering, geology, botany, aerial photography and hydrology, as well as acting as his own attorney. Petitioner, while stating that professional surveying, is nothing more than the application of high school trigonometry, was allowed to testify to the results of his own private surveying methods having no relationship to accepted surveying practices. The Master not only gave probative force to this "expert" testimony but gave it controlling weight over the testimony of two outstanding surveyors licensed to survey public lands in Texas.

In order to conserve space we respectfully refer you again to the State of the Case section hereof and to the parts of Petitioner's discourse with the District Judge referred to in the Court of Appeals opinion. (Petitioner's Appendix, A-16). It is evident that with full knowledge of every element of his cause of action, when it accrued and every person involved, Petitioner for his own convenience delayed filing suit on his cause. As the Court of Appeals said, "McGuire has had many opportunities to right the wrong he claims was done. But, he drove only to get his land back. The Law regards it as a case in which he slept on his claim for other relief." (Petitioner's, Appendix A-16). Certainly the entire proceedings and the result reached have not been unjust to Petitioner.

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served copies of this Brief on Petitioner L. L. McGuire, and to the counsel of record for the other Respondents by depositing same in a United States post office with proper amount of first class postage prepaid, addressed to their respective post office addresses.

Curt F. Steib

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JUN 29 1970
E. ROBERT SEAVER, CLERK

In the

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 182

L. L. McGUIRE,

Petitioner,

v.

JOHN F. BAKER, ET AL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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It is only in the past decade that some of the Circuit Courts have extended the protection of the Civil Rights Act to property rights. *Joe Louis Milk Co. v. Hershey, 243 F. Supp. 351 at page 354 (1965).* Previously property rights could not be so protected. *Holt v. Indiana Mfg. Co., 176 U.S. 68, 20 S. Ct. 272, 44 L. Ed. 374 (1900)* And Petitioner can find no opinion of this Court to the con-

trary. In any event there is no authority that property rights can only be protected by the Civil Rights Act and can not be protected by a suit arising under the Constitution. And a suit for compensation for a taking is just as much a suit arising under the Constitution as a suit to recover the land taken.

In *McGuire v. Sadler, 337 F. 2d. 902,* (Appendix p. A-20) a different panel of the Fifth Circuit held McGuire's suit to cancel the sale was one arising under the Constitution, and on remand the District Court cancelled the sale restoring the land to McGuire. But while in title and possession of Bryant, he sold a leasehold interest, being most of the value of the land, to Gulf. Before the land was recovered the leasehold had expired, the land had been drilled with a dry hold, the speculative value had thus been permanently taken. The same right to recover compensation for the taking of the speculative value existed as to recover the land.

Apart from the conspiracy, the Gulf is liable for this permanent taking of the speculative value just as Woodward was liable for conversion in the Dartmouth College case. Whenever one withholds property from a former owner from whom it has been taken or its title impaired by state action, he is liable to the former owner for the withholding. Certainly only state action is prohibited, but the Gulf was the beneficiary of the prohibited state action and is thus liable for the taking. Usually a simple restoration of the property will suf-

fice to do justice, but in this case the restoration did not include the speculative value. The Gulf is not insulated from liability because it purchased from Bryant; it still withheld and used up the leasehold interest.

The question in the United Transport case, 179 F. 2d 466, cited by Gulf, was whether state or federal action impaired the contract, which has no bearing on this case.

The Gulf argues it had no written contract with McGuire, hence the four year statute 5527 does not apply. The State did, the patent to McGuire's predecessors, and the State impaired this contract by patenting the land to Bryant who sold to Gulf. Everything was in writing to which the four year statute applies.

McGuire did not piecemeal his litigation. There is no statutory or common law action in Texas for damages for civil conspiracy as such. Some act damaging to a plaintiff must be done. In October 1962 McGuire had knowledge of the conspiracy to take his land but all he could do was bring an injunction suit to block the taking, which he did, because no damaging act had been done under the conspiracy.

On June 24, 1963, date of sale of McGuire's lands to Bryant, nominal damages accrued. But how could McGuire then know what defendants were going to do with his land? Would they increase its value or diminish its value? These questions could only be answered on June 13, 1967 when the taking was termi-

nated. Of course McGuire was unable to learn of the amount of his damage if any in advance. It was entirely under the control of respondents.

In the Dickinson case the government had control of the dam and the water level behind it. How could Dickinson know in advance what level of water would be maintained and how much of his land would be covered. This Court held that Dickinson could wait until the damages could be ascertained before filing suit.

The taking and keeping of McGuire's land was a continuing wrong shaped and actively managed by respondents throughout the four year period. Everything that was done to the land was not the natural result of the sale as the cutting of the wooden beam in the Houston Waterworks case, but was done by independent acts of respondents.

There is no rule of law or authority that requires a litigant after filing suit, to amend and add new parties and new causes of action. Piecemealing has no bearing on this case. The only question is whether the action was barred.

The Fourteenth Amendment, "nor shall any State deprive any person of . . . property without due process of law"; is not limited to property which may be legally condemned, nor limited to permanent but also prohibits term deprivation, and all property is protected including speculative values. And the Contract Clause

protects all contracts. The Texas ten year limitation statute, Art. 5510, held applicable to suits for compensation for land taking by the Texas Supreme Court in the Brazos River Case, supra, is not limited to lands which may be legally condemned. Therefore there is no rational basis for respondents attempted distinction between this case and cases cited by petitioner.

In Texas, there is no action for "fraudulent conspiracy". The 2 year statute applicable for damages based on fraud does not apply to a fraudulent taking; it is the 10 year statute applicable to suit for compensation for taking that controls; why should a taker by fraud be treated better than any other taker? The 2 year statute for injury to real property does not apply, because his property was not injured. McGuire's legal title and possession was taken, this kept him from selling leases except to Gulf at a loss of most of his land, causing his loss. McGuire had a right to choose his lessee and not to join their dishonest scheme. Thus no 2 year statute applied, only the 10 year taking statute or the 4 year contracts in writing statute.

Finally if we assume this is only a civil rights suit, that McGuire's land was not taken only damaged, that the 2 year statute applies, McGuire still should recover for all damages caused by respondents' acts within the 2 years preceding suit, April 24, 1967, including the withholding of possession and refusing to cancel the vacancy proceedings. This includes all surveying and most of the legal expenses. It includes the destruction of the speculative value because the Gulf held the

lease until July 15, 1965, altho it announced a dry hole on or about Jan. 1, 1964. (Appendix below p. 13). Lease speculators pay little heed to dry hole announcements but watch the deed records to see what the oil company really thinks of the well.

Summary judgments are abhorrent to petitioner. From his limited experience it seems that the one who obtains such a judgment usually attempts to support it in the appellate court by there attempting to try the whole case on unsworn testimony, untested by cross examination. In the Supreme Court, where a petitioner must keep his argument to essentials, he is nagged by the fear that respondents' unsworn testimony and arguments thereon will have an effect on the Court. All petitioner can do is ask the Court to consider one question only, whether this action is barred by the 2 year statute of limitation.

Respectfully submitted

L. L. McGuire

L. L. McGUIRE, *petitioner*

June 26, 1970